INDEX TO APPENDIX

	Page
Docket Entries in the United States Court of Appeals for the District of Columbia	1
Petition for Review of Order of the Federal Communications Commission, filed February 1, 1966, with Exhibits	5
Prehearing Stipulation and Order in the Court of Appeals, dated March 9, 1966	23, 24
Joint Appendix, filed in the United States Court of Appeals	25
Letter to the Commission signed Fred J. Cook, received February 8, 1965	26
Commission letter in reply to Mr. Fred J. Cook, dated March 12, 1965	30
Commission letter to Red Lion Broadcasting Co., Inc., dated March 22, 1965	31
Letter dated May 19, 1965 from Red Lion Broadcasting Company in response to the Commission's March 22, 1965 letter	32
Commission letter to Reverend John M. Norris, President Red Lion Broadcasting Company, Inc., dated October 6, 1965	37
Letter dated November 8, 1965 from Red Lion Broadcasting Company in response to the Commission's October 6, 1965 letter	40
Commission letter to John H. Norris, Vice President, Red Lion Broadcasting Company, Inc., dated December 9, 1965	44
Commission's PUBLIC NOTICE dated December 10, 1965	50

Index to Appendix Continued

Page

EXHIBITS:

(a) Article from NEWSWEEK, December 7, 1959 51

(b) Article from THE NATION, May 25, 1964 .. 55

(c) "Memo from BILLY JAMES HARGIS" dated December 31, 1964 60

(d) Letter of transmittal and Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pennsylvania) In Response to "Complaint of Democratic National Committee", received by the Commission March 11, 1965 63

(e) Transcript of Tape, received by the Commission from Radio Station KHEP on May 3, 1965 78

Opinions of Senior Circuit Judge Miller and Circuit Judge Fahy, filed November 22, 1966 82

Judgment entered November 22, 1966, per Senior Circuit Judge Wilbur K. Miller 90

Order vacating opinion and judgment filed on November 22, 1966, filed March 13, 1967 90

Opinions of Circuit Judge Tamm and Senior Circuit Judge Fahy, filed June 13, 1967 .....91, 132

Judgment of the Circuit Court of Appeals, entered June 13, 1967 133

Order of this Court granting Certiorari 134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPENDIX

General Docket

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2-1-66—2-notice of appeal from Federal Communications Commission.

2-5-66—Appearance of Henry Geller and John H. Conlin for appellee. F.C.C.

2-5-66—Certified index to record. (n)

2-26-66—4-appellant's motion for leave to amend caption and title of notice of appeal. (m-23)

3-2-66—4-motion of Dr. Carl McIntire and Christian Beacon, a non-profit New Jersey corporation, for leave to intervene. (m-2).

3-9-66—Prehearing order approving stipulation.

3-9-66—1-prehearing stipulation; joint appendix to be filed at same time as petitioner's reply brief, or if none, within 15 days after filing of respondents' briefs.

3-9-66—Order granting appellant's motion to amend caption and title of notice of appeal.

3-31-66—Per Curiam order denying the motion of Dr. Carl McIntire and Christian Beacon, a non-profit New Jersey Corporation for leave to intervene. CJ, Bazelon; Fahy and Burger, CJ.

4-5-66—25-petitioners' brief and service.

5-2-66—1-brief for respondents.

5-10-66—25-respondents' brief and service.

5-10-66—4-motion of petitioners to extend time to file reply brief to May 27th. (C)

5-12-66—Order extending petitioners' time for filing reply brief to May 27th.

5-27-66—25-petitioners' reply brief and service.

5-27-66—25-joint appendix and service.

9-26-66—Argued before Wilbur K. Miller, Senior Circuit Judge, and Fahy and Tamm, Circuit Judges.

10-5-66—Letter from Clerk to all counsel requesting memoranda to be filed on or before October 15, 1966.

10-11-66—6-respondents' memorandum as to jurisdiction. (m-14)

10-17-66—7-appellants' memorandum of law as to jurisdiction.

11-22-66—Opinion per Senior Circuit Judge Wilbur K. Miller.

12-22-66—Separate dissenting opinion by Circuit Judge Fahy.

11-22-66—Judgment dismissing the petition for review of the action of the Commission.

12-6-66—4-respondents' motion to extend time to file petition for rehearing. (m-6)

12-12-66—Order extending respondents' time to file petition for rehearing to December 21st.

12-21-66—25-respondents' petition for rehearing *en banc*.

12-29-66—25-petitioners' answer to petition for rehearing.

3-13-67—Per Curiam order vacating opinions and judgment filed on November 22, 1966, by the court *en banc;* case shall remain with the assigned division of the court for a decision on the merits of the petition. Circuit Judge Robinson did not participate in order.

6-13-67—Opinion per Circuit Judge Tamm; Miller, Sr. CJ. did not participate in decision.

6-13-67—Separate opinion by Circuit Judge Fahy concurring in the result.

6-13-67—Judgment affirming the action of the Federal Communications Commission on review; Sr. Circuit Judge Miller did not participate in the consideration and decision of this case.

6-28-67—4-petitioner's motion to extend time to file petition for rehearing en banc to July 13th. (m-28)

7-3-67—Order granting petitioner's motion to extend time to file petition for rehearing en banc to July 13th.

8-10-67—Certified copies of opinion and judgment filed June 13, 1967, issued to the Federal Communications Commission.

9-6-67—2-petitioners' designation of record for certiorari. (m-6)

9-7-67—Certified record prepared.

9-12-67—Notice from Clerk, Supreme Court of filing of petition for certiorari on September 11th (SC Misc. 600 OT 67).

12-7-67—Certified copy of order from the Supreme Court granting petition for certiorari on December 4th.

12-12-67—2-petitioner's supplemental designation of record. (m-11)

[Filed Feb. 1, 1966]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RED LION BROADCASTING CO., INC., licensee of radio stations WGCB—AM-FM, Red Lion, Pennsylvania, and

REVEREND JOHN M. NORRIS, individually and as president and 80% stockholder of Red Lion Broadcasting Co., Inc., Post Office Box 88, Red Lion, Pennsylvania,

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES OF AMERICA

Respondents

Petition for Review of Order of the Federal Communications Commission and Statement of Reasons Therefor

(see order 3-9-66)

Appellants Red Lion Broadcasting Company, Inc., a Corporation organized under the laws of the Commonwealth of Pennsylvania, licensee of Radio Stations WGCB —AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris as the President and 80 per cent stockholder of the Red Lion Broadcasting Company, give this notice of appeal under Section 402(a) of the Federal Communications Act of 1934 as amended, Title 47 USCA, from the actions of the Federal Communications Commission announced December 10, 1965, directing appellants to provide free time to Mr. Fred J. Cook for the purpose of answering a purported controversial attack on the said Mr. Cook by the Reverend Billy James Hargis, irrespective of Mr. Cook's willingness or ability to pay for such broadcast time.

The Commission after reconsidering its prior order of October 8, 1965 (Ex. "A") pursuant to appellants' Motion for Reconsideration dated November 8, 1965 (Ex. "B") has confirmed its position and on December 10, 1965 ordered appellants to grant Mr. Fred J. Cook the free broadcasting time as demanded in his complaint to the said Commission (Ex. "C").

Appellants are aggrieved and adversely affected by these actions of the Commission and each of the actions is unlawful and beyond the authority of the Commission as is more particularly set forth below.

II.

Aggrievement

The imposition of the so-called "Fairness Doctrine" as ordered in the instant case places unconstitutional restrictions on appellants' right to operate said radio broadcasting facilities.

III.

Statement of Reasons for Appeal

The grounds relied upon (as more particularly set forth hereinafter) are that the said Communications Act and the "Fairness Doctrine" as promulgated by the said Commission and applied to the appellants' operation is repugnant to Article 1, Section 1, and Amendments 1, 5, 9, and 10 of the Constitution, and its continued existence constitutes an unconstitutional restraint upon the rights guaranteed.

1. The statute under which the Federal Communications Commission has promulgated the "Fairness Doctrine" impairs free speech in violation of the First Amendment, by imposing a prior restraint upon the expression of views, arguments and opinions by the owner of the appellants'

radio stations and upon those who seek to pay for and use such facilities.

2. Said statute impairs the right of assembly and petition in violation of the First Amendment by compelling appellants to grant free use of their facilities to offset the effect of opinion expressed over such facilities by others who pay for the use thereof.

3. It infringes upon the right of free speech, petition and assembly of those who pay by increasing the costs to them so that the station owner may allocate an equal amount of time free of charge to those who seek the right of rebuttal.

4. This increased-costs factor constitutes a taking of property of the owner by reducing the number of users of such facilities as well as a taking of property of the user himself by charging such user a higher cost so that another may speak without cost.

5. Said statute is vague, indefinite, and uncertain and neither the statute nor the regulation promulgated thereunder contains any standards capable of ascertainment by those to whom they are directed; it thus infringes upon a fundamental principle that Congress may not in the absence of clearly ascertainable criteria delegate its legislative function to an administrative agency or officer.

6. The enforcement of such regulations is improper, illegal, arbitrary and capricious and threatens the loss to the appellants of valuable rights unless the appellants first surrender the exercise of basic rights guaranteed by the First Amendment, all in violation of the due process clause of the Fifth Amendment.

7. The original Communications Act of 1934 as amplified by the 1959 Amendment sub-section (b) (which incorporates the "Fairness Doctrine") imposes on the radio station owner a continuing liability for any possible libelous

statement made by anyone granted free broadcasting time. The imposition of this forced liability without granting the corresponding immunity provided in sub-section (a) of Section 315 of the said Act constitutes a taking of property without due process of law in violation of the Fifth Amendment to the Constitution.

8. The denial of the right of free speech particularly the right to criticize governmentenal policy and the temporary occupants of public office also violates the political rights guaranteed by the Ninth Amendment, as well as the most basic right reserved to the people by the Tenth Amendment.

THOMAS J. SWEENEY
/s/ ROBERT E. MANUEL
Robert E. Manuel
Suite 620 Shoreham Building
806 15th Street N.W.
Washington, D.C.
(Telephone RE. 7-4660)
Counsel for Appellants

ACKNOWLEDGMENT OF SERVICE (omitted)

Exhibit "A"

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

73281
ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY
IN REPLY REFER TO:
8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station W G C B
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary

either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station

and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and this leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10) —simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission
/s/ Ben F. Waple
Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

Exhibit "B"

Zip Code - 17356 Phone Red Lion 244-3145
244-5360

AM WGCB FM
BOX 88
RED LION, PENNA.

1440 Kilocycles
1000 Watts

96.1 Megacycles
20,000 Watts

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple

statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In response to Complaint of Democratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation*, a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the sub-

ject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness

Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris,
Vice President

Copies to:

Chairman E. William Henry
Commissioner Robert T. Bartley
Commissioner Rosel H. Hyde
Commissioner Lee Loevinger
Commissioner James J. Wadsworth
Commissioner Robert E. Lee
Commissioner Kenneth A. Cox
Henry Geller, Esq., General Counsel

Exhibit "C"

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

77280
PUBLIC NOTICE—B
December 10, 1965

Report No. 5810

BROADCAST ACTION

The Commission, by Commissioners Henry (Charman), Hyde, Bartley, Lee, Cox, Loevinger and Wadsworth, took the following action on December 9. Commissioner Hyde abstained from voting; Commissioner Bartley dissented to issuance of the letter as presently written because it is too long and inaccurate; Commissioner Loevinger concurred in the ruling but not in the letter.

RESPONSE TO WGCB, RED LION, PA., REQUEST FOR RECONSIDERATION OF FCC FAIRNESS DOCTRINE RULING ON FRED J. COOK COMPLAINT

The Commission addressed the attached letter to Rev. John H. Norris, vice president of Red Lion Broadcasting Co., Inc., licensee of AM station WGCB, Red Lion, Pa., in response to his request for reconsideration and clarification of the Commission's October 8 fairness doctrine ruling on complaint by Fred J. Cook, of Interlaken, N. J., concerning a Billy James Hargis "Christian Crusade" program broadcast by WGCB in November 1964.

Attachment

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 65-1103
76921

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

IN REPLY REFER TO:
8427-A
11-186

December 9, 1965

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation*, entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . . "; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.,* FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315 (a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute com-

pliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either

such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seek clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F. 2d 828, 829 (C.A. 5); *Fadell* v. *U. S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U. S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U. S.,* 243 F. 2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities."

See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid.;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 190, 227.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

[Filed March 9, 1966]

[Caption omitted]

Prehearing Stipulation

I. The undersigned parties, by their counsel, agree and stipulate that the following issues are presented by the petition for review in this proceeding:

1. Whether or not Section 315 of the Communications Act, as amended in 1959, adopted the Commission's "Fairness Doctrine" as set forth in the Commission's 1949 Report, "Editorializing by Broadcast Licensees," and if so, whether Section 315 constitutes an unconstitutional delegation of Congress' legislative function.

2. Whether the "Fairness Doctrine" as set forth above, is unconstitutionally vague, indefinite, uncertain and lacks the precision required when legislation which effects the basic freedoms guaranteed by the "Bill of Rights" is adopted.

3. Whether Section 315, as stated in (1) above, violates the Ninth and Tenth Amendments to the Constitution.

4. Whether the "Fairness Doctrine" violates the First and Fifth Amendments to the Constitution, and particularly, whether, under the facts of this case, the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the First and Fifth Amendments to the Constitution.

II. Counsel for the parties further stipulate that the Joint Appendix shall be filed at the same time as the Petitioner's Reply Brief, or in the event no Reply Brief is filed, within fifteen days after the filing of Respondents' Briefs.

III. In preparing the Briefs, the parties shall, when referring to record material, indicate the page, or pages, in

the original record where such material may be found. The pages of the Joint Appendix shall be consecutively numbered, and shall, in addition, bear appropriate record page numbers, so that the reference to the record material printed in the Joint Appendix may be found.

Respectfully submitted,

ROBERT E. MANUEL
Robert E. Manuel
Counsel for Petitioner

HOWARD E. SHAPIRO
Howard E. Shapiro
Counsel for Respondent,
United States of America

ROBERT D. HADL
Robert D. Hadl
Counsel for Respondent
Federal Communications Commission

[Filed Mar. 9, 1966]

[Caption omitted]

Prehearing Order

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO. INC., licensee of radio stations WGCB—AM-FM, Red Lion, Pennsylvania,

and

REVEREND JOHN M. NORRIS, individually and as president and 80% stockholder of Red Lion Broadcasting Co., Inc., Post Office Box 88, Red Lion, Pennsylvania, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

Petition To Review and Set Aside an Order of the Federal Communications Commission

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JOINT APPENDIX

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(1)

1

722 Fernmere Avenue
Interlaken, N. J.
February 7, 1965

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

The purpose of this letter is two-fold: first, to thank you for sending me a copy of your February 1 letter to Maurice Dantin, of Columbia, Miss.; second, to register a complaint against a number of radio stations who are not living up to the FCC's "fairness doctrine."

The commission's position has been made clear, I think, not only in your letter to Mr. Dantin, but in previous rulings. There are, as I understand it, two basic principles involved here: first, stations carrying controversial programs attacking groups or individuals must notify those attacked of the nature of the charges; second, such stations must make available their facilities for a reply.

These two principles go back to the FCC order of June 1, 1949 which said: "When a controversial program involves a personal attack upon an individual or an organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response."

The first part of this rule requiring stations to notify persons attacked of the nature of the charges against them is being almost completely ignored. Of all of the stations carrying the Rev. Billy James Hargis' attack against me, just one, KXEN, in St. Louis, notified me of his remarks and sent me a transcript of them as the rule requires. I

have since learned through correspondence with some of the stations that the Rev. Carl McIntire made a similar attack upon me last fall over his network of several hundred stations, none of whom notified me of this. As a result, I still do not know what he said, and it is now too late to counter it.

So much for the first part of the FCC's fairness doctrine. The second part, involving the offer of a station's facilities for a reply, is being honored fully by many stations in my case, but many others are advancing an interpretation of the rule that can only result in circumventing it. They are insisting that they are not obligated to permit me to reply to Hargis unless I pay for the time.

In correspondence with several of these stations, I have pointed out to them that such an interpretation could result in virtually an air-wave blackmail racket. A station, if this were permitted, could air scurrilous and unfounded charges against an individual—and then make money by insisting that he pay to clear his name. I am certain from my own reading of the "fairness doctrine" that this is not at all what the FCC intended, and therefore I am filing this formal complaint against stations that have taken this attitude.

I shall name for you only stations that have acknowledged they carried the Hargis attack against me and then have refused to air my reply except upon a paid basis. These stations are:

(more)

KXEN in St. Louis—Though this was the one station that sent me a transcript of Hargis' remarks, it has refused to run my tape except on a paid basis.

WGFA, Watseka, Ill.—"Since the Christian Crusade program is sponsored on our station, you'll be required to pay the local five minute, one time rate which is $8."

(2)

WNKY, Neon, Ky.—"We will indeed grant you equal time to answer the charges Mr. Hargis brought out against you . . . This broadcast will cost you $7.50, which is our regular rate for 15 minutes."

WEYY, Talladega, Ala.—"We will be happy to give you amount of time you desire. Enclosed is our rate card."

KHIL, Willcox, Ariz.—"If our interpretation of the existing FCC regulation is correct, we are not required to grant you equal time at our expense, but will be happy to make available our expenses on a basis exactly like the Rev. Hargis for any reply to his allegations you may wish to make."

KBHC, Nashville, Ark.—"Yes, we do carry the daily fifteen-minute Christian Crusade program which is paid for by the Christian Crusade, if you would like equal time on this basis we will make the time available."

KBEN, Carrizo Springs, Tex.—"Time for this program is purchased by Christian Crusade. We will therefore grant you equal time on an equal basis at the exact fee paid by Hargis . . ."

WFDR, Manchester, Ga.—"We will be happy to offer you equal time on the same paid basis as we carry the Christian Crusade Broadcast."

WPHB, Phillipsburg, Pa.—"Christian Crusade pays rate card rate . . . Enclosed please find rate card for your convenience."

WGCB, Red Lion, Pa.—"Your suggestion that we grant you 'free time' for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded 'free time' to inform our listener that they had been slandered." (How ridiculous can you get?)

KVOW, Riverton, Wyo.—Suggests I contact the Intermountain Network as they carried the Hargis program

"from the network on a paid basis." Implication seems to be the same as the others.

WJBS, DeLand, Fla.—"We are happy to make equal time available to you on the exact same basis as was made to the Christian Crusade program . . . If you will forward tape of your reply, accompanied by a check for $5, we will be glad to schedule it for broadcast."

KNOT, Prescott, Ariz.—"I totally reject your demand for time at our expense. Nowhere in the FCC regulations is there such a clause." This from Robert E. Baker, general manager.

KVIN, Vinita, Okla.—Encloses a rate card and says "you may buy as much as you like for as long as you like at the same rate charged Mr. Hargis."

WTTN, Watertown, Wis.—Time purchased by Hargis, offers time "under same conditions of broadcast."

KHEP, Phoenix, Arizona—"In view of lapse of time . . . ."

There are some other stations that appear to be having difficulty determining what to do about it, and I may write you about some of these later. But for the present, this is the list, and I respectfully urge that the commission notify these stations of its stand on the "fairness doctrine" and that doctrine's meaning.

Yours truly,

FRED J. COOK

(3)

3

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

March 12, 1965

Dear Mr. Cook:

This refers to your letter dated February 7, 1965, in which you protest that Stations KXEN, WGFA, WNKY, WEYY, KHIL, KBHC, KBEN, WDFR, WPHB, WGCB, KVOW, WJBS, KNOT, KVIN and WTTN refused to grant you free broadcast time to rebut a personal attack against you aired in late November on the Billy James Hargis program, which these stations carry. You also state that these stations, excluding KXEN, failed to notify you of this attack or its substance.

We have enclosed for your information a copy of the Commission's letter of January 19, 1965, to radio Station WALG, in which the Commission sets forth its views regarding the station's refusal to air a response to a personal attack.

In addition, we have enclosed a copy of the Commission's letter of September 19, 1963, to Cullman Broadcasting Co., Inc., *et al,* in which the Commission set forth its views as to whether free time must be afforded to proponents of views opposed to those previously presented on sponsored programs. A careful reading of the entire letter should serve to place the Commission's policy in this respect in its proper context.

It is the usual practice of the Commission to associate complaints with our files on the station involved and to afford such station the opportunity to comment on the complaint. Accordingly, your complaint is being brought to the attention of the stations involved and they are being requested to submit a statement.

Your interest in writing is appreciated.

Very truly yours,

BEN F. WAPLE
Secretary

(4)

4

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

March 22, 1965

In Reply Refer to:
8425-A
2 238

Red Lion Broadcasting Co., Inc.
Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Gentlemen:

The Commission is in receipt of a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, stating that you refused free broadcast time to him to rebut a personal attack made upon him in late November over the Billy James Hargis program, which is carried by your station. Mr. Cook alleges you advised him:

> "Your suggestion that we grant you 'free time' for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded 'free time' to inform our listener that they had been slandered."

The Commission has no independent information concerning the subject matter of the above complaint and it has reached no determination in the matter. In accordance with its practice of associating complaints with the files of the station involved and affording said station the opportunity to comment on the complaints, this matter is being brought to your attention. Your response should be submitted, in duplicate, within twenty (20) days from the date of this letter.

Very truly yours,

BEN F. WAPLE
Ben W. Waple
Secretary

(5)

5

AM WGCB FM
BOX 88
RED LION, PENNA.

May 19, 1965

Mr. Ben Waple Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Mr. Fred J. Cook;
Your ref. #8425-A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WCGB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to "sponsor" or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

(6)

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*

6

722 Fernmere Avenue
Interlaken, N. J.
December 19, 1964

STATION WGCB
Red Lion, Pennsylvania

Gentlemen:

It has come to my attention that the Rev. Billy James Hargis in a radio broadcast for his Christian Crusade in late November made a personal attack upon me in which, among other things, he said:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959 showed that Fred Cook and his pal Eugene Gleason had made

(6)

up the whole story and this confession was made to District Attorney Frank Hogan."

The purpose of this inquiry is two-fold:

(A) Since your station is listed as one of those that has carried the Rev. Billy James Hargis' Christian Crusade broadcasts, did you in fact put on the air this attack against me made by the Rev. Billy James Hargis? I expect an answer, yes or no.

(B) If you did, this is to serve notice that I shall expect you to grant me equal time, at your expense, as provided in FCC regulations, to answer in appropriate fashion this slanderous and libelous attack.

Yours truly,

FRED J. COOK

7

AM WGCB FM
BOX 88
RED LION, PENNA.

December 28, 1964

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

Reference: Your Letter of
December 19, 1964

Dear Sir:

Our letters (copies enclosed) dated September 15th and October 20th, 1964 to the Democratic National Committee, and to the American Civil Liberties Union, dated October 22, 1964; explain the position into which we have been forced by recent requests such as yours.

(8)

Our rate card is enclosed. Your prompt reply will enable us to arrange for the time that you may wish to purchase.

Very truly yours,

W G C B Radio Stations

Rev. John M. Norris, *Owner*
Rev. John M. Norris, Owner

JMN:vp
ccs:
Interested Parties

To Our Friends:

The above is in reply to another sample of the harrassment to which we are now quite familiar.

Almost every week we receive some form of pressure, usually regarding "free time" to answer the so-called "Hate Groups."

J. M. N.

8

722 Fernmere Avenue
Interlaken, N. J.
December 31, 1964

Rev. John M. Norris
Owner, Radio Station WGCB
Red Lion, Pa.

Dear Mr. Norris:

Your letter of December 28, in response to mine of the 19th, arrived today. Unfortunately, it does not answer the first question that I ask you: Did you or did you not broadcast the attack that the Rev. Billy James Hargis made upon me in late November (one transcript that has come to my attention was dated Nov. 25)?

(8)

If you did not, there is of course no need for a reply; if you did, I submit that the least of your obligation in this matter is to grant me free time for a brief reply. Otherwise, it is conceivable that radio stations might be able to drum up a fairly good business by selling time to persons who have been slandered.

In any event, would you please give me an answer to the primary question: Did you or did you not carry this broadcast?

Yours truly,

FRED J. COOK

AM WGCB FM
BOX 88
RED LION, PENNA.

January 7, 1965

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

Reference: Your letters of December 19th and 31st, 1964

Dear Mr. Cook:

Regarding your letter of December 31, 1964, we at a loss to understand your statement that may imply that we ought *not* to "drum-up business"—we could ask, "How else may we be expected to stay in business?"

Your suggestion that we grant you "free time" for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded "free time" to inform our listeners that they had been slandered. This would soon remove all broadcasting from the realm of free enterprise, leaving only government subsidized and controlled radio. I am sure Mr. Cook, that you would not wish this to happen.

(9)

For your information, it was your article on "The Hate Club of the Air" which alerted us to several of these broadcasts which we later acquired, so that now we carry them all. Your article has resulted in cutting our deficit spending by almost one half, thus the harm that was intended has greatly benefited us.

As to the tape in question, we have run the tapes that we have received from Dr. Hargis. We doubt that he has discriminated against our Station in this instance.

Yours in His Service,

W G C B Radio Stations

Rev. John M. Norris, *Owner*
Rev. John M. Norris, Owner

JMN:vp
ccs: Interested Parties

9

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign.

(9)

Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is

defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

(10)

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report*, Paragraph 10)—simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or

(10)

representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

11

(Received Nov. 8, 1965)

AM WGCB FM
BOX 88
RED LION, PENNA.

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to pro-

vide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Democratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation*, a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour

(it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the

Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris, *Vice President*

Copies to:

Chairman E. William Henry
Commissioner Robert T. Bartley
Commissioner Rosel H. Hyde
Commissioner Lee Loevinger
Commissioner James J. Wadsworth
Commissioner Robert E. Lee
Commissioner Kenneth A. Cox
Henry Geller, Esq., General Counsel

(13)

13

FCC 65-1103 76921

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation,* entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had preivously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken

by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.*, FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media,

14

such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

(14)

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion

of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either

such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seek clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F. 2d 828, 829 (C.A. 5); *Fadell* v. *U.S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.,* 243 F. 2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty,

character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6.

17

Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission
Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

(18)

18

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

77280 Public Notice—B

December 10, 1965

Report No. 5810

BROADCAST ACTION

The Commission, by Commissioners Henry (Chairman), Hyde, Bartley, Lee, Cox, Loevinger and Wadsworth, took the following action on December 9. Commissioner Hyde abstained from voting; Commissioner Bartley dissented to issuance of the letter as presently written because it is too long and inaccurate; Commissioner Loevinger concurred in the ruling but not in the letter.

RESPONSE TO WGCB, RED LION, PA., REQUEST FOR RECONSIDERATION OF FCC FAIRNESS DOCTRINE RULING ON FRED J. COOK COMPLAINT

The Commission addressed the attached letter to Rev. John H. Norris, vice president of Red Lion Broadcasting Co., Inc., licensee of AM station WGCB, Red Lion, Pa., in response to his request for reconsideration and clarification of the Commission's October 8 fairness doctrine ruling on complaint by Fred J. Cook, of Interlaken, N. J., concerning a Billy James Hargis "Christian Crusade" program broadcast by WGCB in November 1964.

Attachment

19

Newsweek, Dec. 7, 1959

REPORTER ADMITS CHARGE OF SLUM BRIBE WAS LIE

Retreat of the Crusaders

The accusation by New York City's best-known team of crusading reporters blew up the biggest journalistic storm of the year.

It broke in the midst of a television talkfest—producer David Susskind's weekly "Open End" on WNTA-TV. In routine fashion, the TV panel was discussing "The Shame of New York," a recent 70,000-word exposé written for the weekly magazine The Nation by reporters Fred J. Cook and Eugene Gleason of The New York World-Telegram and Sun. Then suddenly, Cook made a startling allegation: When he and Gleason had been digging into the city's slum-clearance housing muddle for a World-Telegram and Sun series in 1956, a "high city official" had tried to bribe them to "get wise."

The bribe offer had been made to Gleason, who told him about it, Cook said. According to Cook, Gleason quoted the city official as saying: "What do you want? Seventy-five bucks a week, a hundred bucks a week? We can arrange it. We can put your wives on the payroll and you won't have to do anything for it, just stop looking."

Who was this high city official? Cook refused to say. But, panelist Gleason, who had agreed with Cook to have the bribe question brought up on the air, added that the official was still active in the city administartion.

And with that, as Gleason put it later, "the fat was in the fire." The background of the two newsmen gave weight to their charges. Both mild-mannered, 48-year-old Fred Cook ("the writing half of the team") and burly

(19)

32-year-old Gene Gleason (the "reporting half") had won New York Newspaper Guild awards for their work. Cook was a veteran crime reporter, with fifteen years on The World-Telegram. And Gleason though with the paper only four years, had earned a reputation as a hard-nosed investigator, once praised by his editors as "tough physically . . . and mentally. No one awes him."

RETRACTION: But the next day, when the two newsmen were questioned by District Attorney Frank Hogan, Gleason retracted the whole story. He had made up the bribe offer, Gleason was quoted as having said, "because I was exuberant and carried away." In a six-page statement (he left without signing it), Gleason took full blame, explaining that Cook had only repeated what he had been told.

The World-Telegram and Sun promptly fired both reporters—Cook because he had "not told the city desk" about the alleged bribe offer. He insisted that he had reported the offer to city editor Norton Mockridge, at a lunch, "a few weeks afterward." But Mockridge said Cook had told him only about "pressures . . . in the form of job offers and favors proffered by one or more press agents who were close to City Hall." Mockridge added: "He didn't say anything about a bribe offer. He was just talking about little advances made by press agents. We laughed about it."

WAKE: But there was no laughter last week in The World-Telegram city room. "It was like a wake up there," a reporter said in describing the morning after Gleason's confession.

Fred Cook stood by the charges of corruption he and Gleason had made in their Nation article on "The Shame of New York." "But," he said, "you know people, and how they think. Now they're going to say, 'And how can we believe these two fellows?'"

Cook—a sympathetic figure to many of his colleagues—seemed bewildered by all that had happened. Why had Gleason, if the bribery charge was false, allowed Cook to bring it up on TV? "I've asked Gene several times," Cook said. "But somehow it's impossible for him to explain."

David Susskind was also puzzled. "I can't think how two grown, mature men would do this, would destroy themselves, without some pressure being exerted," Susskind said. "It seems there's a missing link somewhere."

20

Reprinted From
THE NATION
May 25, 1964 . . 35¢

Radio Right

Hate Clubs of the Air . . . . . Fred J. Cook

Right-wing fanatics, casting doubt on the loyalty of every President of the United States since Herbert Hoover, are pounding the American people, this Presidential election year, with an unprecedented flood of radio and television propaganda. The hate clubs of the air are spewing out a minimum of 6,600 broadcasts a week, carried by more than 1,300 radio and television stations—nearly one out of every five in the nation—in a blitz that saturates every one of the fifty states with the exception of Maine.

The symbols on the map [page 525] represent cities in which radio or TV stations (or both) broadcast the doctrines of the rabid Right. It looks as if the nation were seized with a virulent pox. Some stations broadcast a single right-wing spell-binding program twice a day; many run three or four of the leading programs daily throughout the week, with television on Sunday. This loading of station logs with hate-club indoctrinations is generally un-

answered, for there are no comparable amounts of money, organization or broadcasting resources on the labor and liberal fronts. (For example, the well-known Edward P. Morgan program, sponsored by the AFL-CIO and released through A.B.C. radio network, is heard on only 231 outlets.)

The one-sided hammering at the American mind is made possible by two main factors: the enormous concentration of wealth and power in the hands of a few egocentric reactionaries like H. L. Hunt and J. Howard Pew, and the foundation tax dodge which permits such men to subsidize their propaganda at the expense of the rest of the nation's taxpayers. The importance of the foundation gimmick in financing the spate of radical Right propaganda becomes apparent when one takes a look at the major right-wing programs now being pumped out over the airways. Here is a compilation, made about the first of the year, of the major propagandists and their audiences:

Twentieth Century Reformation Hour. Sponsored by the tax-exempt Christian Beacon, Inc., this program carries the voice of the Rev. Carl McIntire of Collingswood, N. J., five days a week over 546 radio stations in forty-five states. McIntire is now, in the terms of airwave exposure, the No. 1 spokesman of the radical Right.

Life Line. This is the tax-exempt foundation set up by Texas oil billionaire, H. L. Hunt, to purvey his extremist views. Produced in Washington, D. C., and featuring the voice of Gene Scudder, a former federal employee, Life Line is now heard once (sometimes twice) daily on 325 radio stations and weekdays on sixty-nine TV stations in forty-two states and the District of Columbia. [See "H. L. Hunt: Portrait of a Super-Patriot," by Robert G. Sherrill, *The Nation*, February 24.]

Manion Forum. Created by Clarence Manion, former Dean of the Notre Dame law school and briefly a minor official in the Eisenhower administration, this program is

produced in South Bend, Ind., and heard weekly over 261 radio stations and three television stations in forty-one states and the District of Columbia.

HOWARD KERSHNER'S COMMENTARY ON THE NEWS. Produced by the Christian Freedom Foundation and bankrolled initially by more than $800,000 of tax-exempt Pew oil money, the Kershner commentary issues from 250 West 57 Street, New York, and is heard weekly on 362 stations in forty-one states.

DAN SMOOT REPORTS. An off-shoot of Hunt's first propaganda mill, *Facts Forum*, this program carries the voice of the former Fedaral Bureau of Investigation agent who was then Hunt's commentator. Smoot subsequently went into business for himself, established his headquarters in Dallas, and now purveys his message weekly over seventy radio and forty television stations.

AMERICA'S FUTURE. This so-called "educational institution," also tax-exempt, operates out of New Rochelle, N. Y. It is the radio arm of the arch-Right Committee for Constitutional Government, born back in New Deal days out of newspaper publishers' and big business' horror of the 40-hour week. It produces a 15-minute news commentary by R. K. Scott, once sales manager for a regional radio network in Raleigh, N. C. The importance of the program, carried now by 365 stations in forty-eight states, lies in its network status. Originally distributed by A.B.C., it shifted in 1960 to the Mutual network.

CHRISTIAN CRUSADE. Another foundation, its program is the property of the anti-Communist evangelist, Billy James Hargis. Bankrolled in 1962 by an estimated $1 million in tax-exempt income, Christian Crusade, from its headquarters in Tulsa, Okla., last year was distributing five days a week to fifty-five radio stations; in addition, a weekly television program was being carried by seven stations. This year, Hargis greatly expanded his operation. In his

monthly newsletter to the dedicated, he announced that on February 16, the Christian Crusade would be extended to more than fifty additional stations comprising the Intermountain Network and covering the states of Colorado, Wyoming, Montana, Idaho, Utah, Nebraska, Nevada, South Dakota and New Mexico. This, Hargis wrote, was "virgin territory for Christian conservatism," and he added: "The people who live in these states are generally 'fundamental Christians' and essentially patriotic . . . they need only guidance and inspiration to do battle on behalf of God and country. . . . No effort is more important than radio. . . . Local anti-Communist chapters are great, but for the most part they are patriots talking to patriots, while radio reaches the uninformed—those who have never heard."

RADIO EDITION OF THE INDEPENDENT AMERICAN. This 15-minute radio commentary carries the views of Kent and Phoebe Courtney, the New Orleans radical rightists who publish *The Independent American* and helped organize the Conservative Society of America. Thirty-nine stations in eighteen states carry the commentary.

CHURCH LEAGUE OF AMERICA. A weekly radio series originating in Wheaton, Ill., this endeavor began

in 1962 and now has a following over seventeen stations in eight states.

In addition to these major right-wing efforts, there is the Citizens' Council Forum, the air arm of Southern white supremacy. This is no mere local or regional effort. As far back as April, 1959, the Forum announced that its programs were being carried on television stations in ten states and that its radio programs were being heard over stations in thirty states. In its April-May, 1961, issue, the Forum bragged of sixty-four TV stations and 319 radio stations in forty-three states, and that, during 1960, it had

distributed 1,300 TV programs and 6,419 radio shows. With the intensification of the civil rights battle, this performance has been stepped up still further.

A propaganda effort conducted on such a scale, especially where expensive TV time and production is involved, implies a staggering sum of money. The backing comes from wealthy businessmen, presumably responsible leaders in their businesses and communities. Clarence Manion, for instance, who claims that is costs $6,000 a week to maintain his regular radio programs, has said that the money is given by 582 "leading industrialists, business and professional men." Even $6,000 a week is not enough to defray all of Manion's costs, for he often appeals for additional funds to back special projects. Such is the tab for just one of the right-wing programs. What the overall outpouring costs, no man can say with authority; but Wesley McCune, a former federal official and now director of Group Research, Inc., a Washington organization that checks on rightists, estimated last year that the air-wave propaganda budget was close to $20 million.

Except for the Citizens' Council Forum, dedicated primarily to the race issue, the themes and viewpoints of the right-wing broadcasts are almost identical and interchangeable, and their leadership is closely linked in the blood brotherhood of fanaticism. Though the organizations are autonomous, each encourages and promotes the products of the others, and the crossties of their leadership dramatize their identity of interest. Throughout the movement, the tie that binds seems to be that of the John Birch Society. The Birchitest may have been discredited in the majority of minds when their leader, Robert Welch, charged that President Eisenhower was a dedicated agent of the Communist conspiracy; but all the evidence shows the organization is far from dead—that, indeed, its views live on, promulgated by other mouths, and that it serves to coalesce the fanaticisms of the Right.

(21)

Immediately after the assassination of President Kennedy on November 22, there was a temporary revulsion in America against the doctrines of hate. National leaders, the clergy and spokesmen for sanity in many walks of life emphasized that when fanatics tear down the image of the Presidency and foment doubts about the loyalty of the nation's most exhalted public figure, they create a climate of hate and unreason in which the unstable inevitably are incited to violence. This was so well understood that Thomas G. Aaron resigned as chairman of the Kentucky Young Americans for Freedom, saying: "I am now satisfied that the climate of political degeneracy and moral hysteria masquerading as 'true Americanism' bears substantial culpability for the murder of the President of the United States."

Ironically, in the weeks immediately preceding his assassination, one of President Kennedy's principal concerns had been this wholesale spawning of hate. The columnist Marquis Childs reported on October 10, 1963, that the President, in talking with an old and trusted friend, had "unburdened himself with considerable bitterness on the subject of top-bracket taxpayers and the tax-exemption they use to spread propaganda of the extreme Right."

But not even the tragedy of Dallas could move or deter the merchants of hate. Aides of the Democratic National Committee, who have been monitoring the broadcasts, report that the attempts to paint Kennedy with a Red smear (attempts that even alleged the Communists had chosen the members of his cabinet) are now being transferred with equal virulence to President Johnson. The attack takes the form that Mr. Johnson named Chief Justice Earl Warren to head the commission investigating the Kennedy assassination at the behest of the Communist organ, *The Daily Worker*. McIntire, Manion and Smoot, the Democrats say, "have all repeated this libel."

What are some of the other views being purveyed to the people of the nation in these dovetailing hate broadcasts?

They are, in essence: Get the U. S. out of the UN, and the UN out of the U. S. Abolish all foreign aid. Abolish unemployment compensation. Promote right-to-work laws, with the object of crippling and eventually wiping out labor unions. Impeach Chief Justice Warren—and other Justices of the Supreme Court. Abolish Social Security, a "socialistic" device; sell the Tennessee Valley Authority to private interests because it also is "socialistic"; fight integration; oppose medicare. And, though one has to be a bit deft about advocating this (and not all of them advocate it), "take care of" the Jews and the Catholics—and even that preponderance of the Protestant ministry which refuses to follow the doctrines of the hate peddlers.

In addition to this basic script, the individual propagandists have their pet peeves and prejudices—and their own mannerisms. Some are crude, some suave. But, in sum, they would roll back all of the social legislation of the last thirty years and, in the process, they would crush minorities and dissidents. To get the full impact, one must listen to a few of the individual voices in representative broadcasts.

The Rev. Carl McIntire, the deposed Presbyterian minister, a rabble-rousing voice on 546 radio stations, denounces the civil rights program as "serving the ends of radical powers that are working for a Socialist order in this free land." Behind the slogans "liberty" and "democracy," he sees the hideous visage of "planned economy." Brotherhood Week is a "gross perversion of Christian teachings." Roman Catholicism is the "greatest enemy of freedom and liberty that the world has had to face today." This is a surprise because, in McIntire's world, the National Council of Churches also qualifies for "the greatest enemy" title. It is "apostate, Communist and Modernist"; it is "the strongest ally of Russia and the radical labor movement within the U. S."

(22)

22

December 31, 1964

MEMO FROM BILLY JAMES HARGIS

I have heard from several stations that carry our CHRISTIAN CRUSADE broadcasts of a demand for "equal time" under the "fairness doctrine" by Fred J. Cook. Although you may not have received a letter from Cook, I am writing this memo to all our stations for your information. Regarding Fred J. Cook and my broadcast mentioning him, I submit the following:

1. IF YOUR STATION CARRIES THE WEEKLY BROADCAST OF CHRISTIAN CRUSADE ONLY (30-minute program), the statement concerning Cook was not carried by your station in November, as he charges.

2. The broadcast to which Cook refers was a daily FIFTEEN-MINUTE Christian Crusade broadcast on November 25, 1964, at which time I said the following: "Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT'. Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government agencies . . . Now, among other things Fred Cook wrote for THE NATION, was an

article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right'!"

3. Fred J. Cook apparently was notified of this statement by the National Council for Civic Responsibility of the Public Affairs Institute, Inc., Washington, D. C. (which Arthur Larson heads), which sponsored a leftist smear broadcast designed to defeat Senator Goldwater prior to the election called "SPOTLIGHT". The program was dropped the day after Goldwater's defeat. Now Larson's anti-anti-communist group (they are not anti-communist but anti-anti-communist) is monitoring, by their own admission, all conservative anti-communist, religious or news broadcasts in order to harass the local stations with demands for equal time until all such programs are dropped by the stations. The very fact that Cook was not certain of the date of the broadcast or the stations that carried the program shows it was SECOND-HAND or HEARSAY, as far as he was concerned . . . and, in fact, had been PUT UP to his action of demanding equal time.

4. Regardless of Mr. Cook's denial, all of these things we said about him . . . and much more that could be said . . . are true. As proof, I am enclosing an exact copy of the exposure of Cook in NEWSWEEK Magazine, December 7, 1959.

However, for your information, I respectfully submit the following information on Mr. Cook (This material is taken from the National Review Bulletin published by William F. Buckley, Jr., 150 East 35th Street, New York City, New York, in a September 29, 1964, issue): "Grove Press claims the first anti-Barry Goldwater book of the campaign, 'Barry Goldwater: Extremist of the Right', by Fred J. Cook, a professional mudslinger who has written

(22)

books knocking a) the FBI; b) the CIA; c) the 'ultra-right'; d) conservative commentators; but not Alger Hiss (whose story he thinks is unfinished). Since Cook was fired from the New York World Telegram for lying, on television, about having been offered a bribe by New York City officials, he has been writing mostly for The Nation."

Some of our stations have written to us telling us that their standard answer to these people wanting equal time on a free basis is that since Christian Crusade pays for its time, those people can have equal time also on a paying basis. This satisfies the Federal Communications Commission and stops the harasser.

If I can be of further service, feel free to call upon me as I am glad to be on your team. This organization has three attorneys . . . including the President of the Oklahoma Bar Association, LeRoy Blackstock . . . on permanent retainer, and I can assure you that we say nothing that we are not positive is true. In our fifteen years on national radio, we have never been sued for libel, neither has any of the stations that carry our broadcasts.

I am sorry if Cook has harassed you. You can now see just a little of what we go through in our defense of the Constitution and Christianity.

Yours for God and our children,

BILLY JAMES HARGIS
Billy James Hargis
Tulsa 2, Oklahoma

23

LAW OFFICES OF
COTTONE AND FANELLI
1001 CONNECTICUT AVENUE
WASHINGTON 36, D. C.

March 11, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Station WGCB, Red Lion, Pa.,:
Complaint of the Democratic National
Committee (Ref. #8427-0)

Dear Sir:

Transmitted herewith, pursuant to the Commission's letters of February 10th and 25th, 1965, in a statement of Station WGBC in response to the complaint of the Democratic National Committee.

Please communicate with this office if any further information is desired.

Very truly yours,

BENEDICT P. COTTONE
Attorney for
Red Lion Broadcasting
Company

Enclosure

(24)

24

Exhibit "A"

STATEMENT OF RED LION BROADCASTING COMPANY, INC.,
(STATION WGCB AM-FM, RED LION, PENNSYLVANIA)
IN RESPONSE TO COMPLAINT OF
DEMOCRATIC NATIONAL COMMITTEE

We have been informed that before the pending application for transfer of control of Stations WXUR AM-FM, Media, Pennsylvania, to Faith Theological Seminary may be further processed by the Commission, it is necessary that a reply be submitted immediately by Station WGCB, Red Lion, Pennsylvania, to a complaint filed by the Democratic National Committee (hereinafter DNC) against that Station, alleging violation of the Commission's so-called "fairness doctrine."

The complaint of the DNC, dated February 1, 1965, was apparently filed with the Commission on or about February 2, 1965. Under date of February 10, 1965, the Commission wrote Station WGCB as follows:

> The Commission is in receipt of a complaint from the Democratic National Committee stating that you refused to make available to it free broadcast time to rebut certain programs broadcast over your facilities concerning controversial issues of public importance. A copy of that complaint is enclosed for your information.
>
> The Commission has no independent information concerning the subject matter of the above complaint and it has reached no determination in the matter. In light of the Commission's "fairness doctrine" relating to the treatment of controversial issues of public importance and in accordance with its practice of associating complaints with the files of the station involved and affording said station the opportunity to comment on the complaints, this matter is being brought

to your attention. Your response should be submitted, in duplicate, within twenty days of the date of this letter.

Under date of February 12, 1965, Station WGCB, by Rev. John M. Norris, President and 80% stockholder of Red Lion Broadcasting Company, licensee of Stations WGCB AM-FM, wrote the Commission as follows:

25

We have received our first official complaint from the FCC in nearly 15 years of broadcasting. We are amazed.

Since you have no independent information in this matter, and have reached no determination, and in the light of the Commission's so-called "Fairness Doctrine", we request an immediate hearing. I will make myself available at your earliest convenience.

Now well into my 82nd year, I have never before been subjected to such religious and political persecution. "Blessed are ye, when men shall revile you, and persecute you and shall say all manner of evil against you falsely, for my sake." Matthew 5:11.

On February 25, 1965, the Commission wrote to Rev. Norris, in part, as follows:

As you were previously advised the Commission has no independent information regarding the complaint. The complaint has not at present been scheduled for a hearing, but, instead, the Commission is endeavoring to secure information about it and to allow the licensees against whom the complaint was made to present their views. Accordingly, it is requested that you present your response to the complaint of the Democratic National Committee, in writing, within fifteen days of the date of this letter.

(25)

The complaint of the DNC sent to WGCB with the Commission's letter of February 10, 1965, stated that the Committee, pursuant to the Commission's "fairness doctrine", requested and was refused time on certain stations carrying four programs in order to "present contrasting views concerning certain controversial issues of public importance treated on these programs." The Committee stated that there were attached to its complaint "copies of the transcripts of those programs which prompted the Committee's request, copies of the Committee's letters to those stations carrying the programs, and copies of the response of individual stations to those requests. The Committee further stated: "This material clearly identifies the programs and issues involved and the basis and nature of the Committee's requests."

Washington counsel was called by the Commission's staff on March 5, 1965, and was told that it was necessary that a response to the complaint be

26

promptly submitted. He pointed out that neither he nor Station WGCB had been supplied with any of the attachments to the complaint and that a reply could not be submitted unless we were promptly furnished such attachments, at least to the extent that they applied to Station WGCB. The following day, our counsel received from the Commission the following material:

1. A letter dated September 5, 1964, from the DNC, which did not indicate the name of the addressee. In this letter, the DNC requested time to reply to two broadcasts on "The Dan Smoot Report". Scripts of these broadcasts (nos. 468 and 469) were included in the material sent to Washington counsel. The broadcasts were entitled, respectively, "Foreign Aid and Poverty" and "War and Politics—1964". Also, a letter dated September 21, 1964, requesting time for

reply to Dan Smoot Broadcast #472, dated September 7, 1964, entitled "Politics 1964." The script of this broadcast was included.

2. A script of a "Carl McIntire Broadcast of August 19, 1964, as Monitored by the Democratic National Committee." No letter from the DNC pertaining to this broadcast was included.

3. A script of "Life Line", Program #75, dated October 1, 1964, entitled "East-West Economies". No letter from the Committee was included.

4. A letter dated October 12, 1964, from the DNC, addressed to "Dear Sir", with no addressee indicated. This letter demanded time to reply to "Manion Forum", Broadcasts #516 of August 23, 1964, and #519 of September 13, 1964, entitled, respectively, "The Bureaucratic Bulldozer called Urban Renewal", and "The Next President Could Win the Cold War by Permitting Congress to Reveal Communist Subversives."

27

Broadcast #516 was included in the material sent to Washington Counsel, but Broadcast [illegible] was not.

Since July 1, 1964, Station WGCB has received a number of communications from the DNC pertaining to broadcasts which, according to the Committee, dealt with controversial public issues, requiring the giving of time by the station for the broadcast of opposing views by the DNC. However, WGCB has at no time received from the DNC letters of September 5, 1964 and September 21, 1964, concerning Dan Smoot Broadcasts Nos. 468, 469 and 472, nor any letter concerning the "Manion Forum" Broadcasts Nos. 516 or 519. WGCB did receive from the DNC a letter postmarked September 5, 1964, which pertained to the Carl

(27)

McIntire broadcast of August 19, 1964, and a letter dated October 16, 1964, pertaining to "Life Line" Program #75.

Correspondence between WGCB and the Democratic National Committee began on June 29, 1964. On that date, there appeared in *Broadcast Magazine* an item stating that the Democratic National Committee "has warned about 1300 radio and television stations that certain programs they carry 'have repeatedly attacked the candidates, programs and policies of the Democratic Party' and implied they could make the stations liable to claims for time to answer them." Reference was made to an article in *The Nation* on May 25th, entitled "Radio Right: Hate Clubs of the Air", which pertained to nine programs carried on stations throughout the country. On June 29th, Rev. Norris wrote to the DNC, pointing out that WGCB had not received the letter referred to in the *Broadcasting Magazine* article and asking that it be sent a copy of the letter. On July 1, 1964, WGCB received the letter from the DNC postmarked June 29, 1964, referred to in the *Broadcasting Magazine* article. DNC enclosed a reprint of the article in *The Nation* and stated: "In view of the coming political campaign, I thought you should be aware both

28

of the contents of these programs and the claims for time to which these attacks can make you liable". Under date of July 1, 1964, Rev. Norris wrote to the Committee, criticizing the tactic of releasing its letter for publication in a magazine article on the same date its letter was mailed and before the letter had been seen by the stations concerned.

Under date of July 2, 1964, another unaddressed letter on the letterhead of the DNC and entitled "URGENT ATTENTION STATION OWNER OR MANAGER" was sent to WGCB. This letter referred to a broadcast by Dr. Carl McIntire which allegedly attacked the Committee's Deputy Chairman for Public Affairs and the Committee itself. It was

requested in this letter that the station "immediately transmit to me the text of these broadcasts and the offer of your facilities for an adequate response. In the event that you do not do so, the matter will be brought to the attention of the FCC". Another letter bearing the date July 3, 1964, and headed "URGENT ATTENTION STATION OWNER OR MANAGER" was received by WGCB on July 9, 1964. This letter stated that, on the date of the letter, another broadcast had been made by Dr. McIntire attacking the Deputy Chairman and the DNC.* The letter referred to the Commission's ruling that the text of attacks of this sort must be transmitted to the person or group attacked, together with the offer of facilities for an adequate response. The station was again warned: "Unless I hear from you promptly, this matter will be brought to the attention of the FCC".

On July 6, 1964, Rev. Norris wrote to the Committee's Deputy Chairman, stating that time was being offered to the DNC on the sponsored 20th Century Reformation Hour program, at no cost to the Committee. Rev. Norris pointed out that it was economically impossible for Station WGCB to make free time

available in answer to paid broadcasts without opening the floodgates to similar requests for free time to everybody. WGCB then received another letter from the DNC dated July 8, 1964, again headed "URGENT ATTENTION STATION OWNERS AND MANAGERS". In this letter, the Deputy Chairman stated that he had received the texts of the McIntire broadcasts and therefore no longer needed them. He stated further that he expected a specific offer of facilities for an adequate response, and, in anticipation, had prepared a thirty minute taped discussion "Hate Groups of the Air". Again it was stated ". . . in the event such an offer is not received, the entire matter will be brought to the attention of the FCC".

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* Both of these Dr. McIntire broadcasts were carried on WGCB.

(29)

On July 9, 1964, Rev. Norris wrote the Deputy Chairman that the Committee's July 3rd letter had just been received, referred to his (Rev. Norris') prior letters, and thanked the Deputy Chairman for his "continued interest in the programming of this station". On July 21, 1964, Rev. Norris again wrote the Deputy Chairman, referred to the receipt of the Committee's July 8th letter, and pointed out that the station was still awaiting replies from the DNC to the station's earlier letters. In a letter dated July 31, 1964, the Deputy Chairman stated that he was preparing ". . . a report to the FCC regarding those stations that have failed to provide me with facilities to make an adequate response to these attacks". In an undated letter postmarked September 5, 1964, WGCB was advised by the Special Counsel to the DNC that in view of the fact that a thirty minute taped response of the Deputy Chairman had been broadcast in full on the 20th Century Reformation Hour, the Deputy Chairman ". . . has determined not to pursue this particular matter any further."

30

By undated letter postmarked September 5, 1964, WGCB was advised by the Special Counsel to the DNC that during a portion of a 20th Century Reformation Hour broadcast, an attack had been made on Carl Rowan, the Director of the United States Information Agency. The Committee stated that it believed that an attack on Mr. Rowan was an adverse reflection on the character and quality of the presidential appointments of this Democratic Administration and its conduct of the foreign affairs of this nation." The Committee, therefore, requested WGCB to furnish time to "present its views concerning this controversial matter; unless, of course, you have already taken affirmative steps to present viewpoints contrasting to those broadcast over the program in question." By letter dated September 15, 1964, Rev. Norris replied that time to the DNC would be made available on a paid basis. Time for reply to the

alleged attack was offered to Mr. Rowan on the 20th Century Reformation Hour, without cost to Mr. Rowan or the DNC, but Mr. Rowan declined.

By letter dated October 16, 1964, the DNC referred to "Life Line" Program #75 on October 1, 1964, entitled "East-West Economies" in which statements were made which were allegedly "highly critical of the policy presently engaged in by the United States providing economic assistance to certain countries in Eastern Europe." The Committee stated its belief that this program was a controversial issue of public importance and requested time to present its views on this matter unless the station had already taken other steps to present contrasting viewpoints. By letter dated October 20, 1964, Rev. Norris referred to WGCB's previous letters, pointed out that the Committee was expending large amounts of money to buy radio and television time but that the only requests made by the Committee to WGCB, "a small, independent station," were for free time. Rev. Norris

in this letter informed the Committee that in the 1960 presidential campaign, when the 1960 Democratic Presidential nominee visited the nearby York Interstate Fair, WGCB offered free time to present him. This offer was rejected. WGCB was told that the two network stations in York had been given exclusive rights. (If desired, WGCB will provide the Commission with names, dates and other pertinent information concerning this incident.)

By letter postmarked October 27, 1964, from Mr. Lloyd Wright, Media Coordinator for the DNC, there was transmitted to WGCB by the DNC a tape containing political spot announcements with a suggestion that WGCB contact the local DNC to arrange for the purchase of time for these spots on WGCB. John Norris contacted Mr. Donald T. Puckett, the local DNC Chairman, who agreed to buy two spots on WGCB-AM and twelve spots on WGCB-FM. The

(31)

total cost was $16.50. WGCB started to write a "thank you" note to Mr. Wright but before it was completed, the WGCB traffic manager was notified that the spots had been cancelled. Under date of November 10, 1964, Rev. Norris informed Mr. Wright that WGCB had gladly accepted the DNC's request for paid air time and in order to do so, WGCB had actually cancelled area business commercials; then, the DNC spots were cancelled.

In a letter dated January 28, 1965, the DNC referred to a Dan Smoot broadcast allegedly attacking President Johnson's education proposals. The Committee stated that it desired to know whether that broadcast was carried on WGCB and if so, what efforts had been made to present a broadcast favoring the President's education proposals. On February 2, 1965, Rev. Norris replied, raising a question as to whether the Committee's request was genuine in view of the Committee's failure to answer the many previous letters from WGCB offering time on a paid basis.

32

By letter dated February 10, 1965, the DNC wrote to Rev. Norris stating as follows:

> Thank you for your reply to my recent letter.
>
> You will please note that I did not request that you make time available for a broadcast by the Democratic National Committee. I asked whether you had made any effort to comply with your obligations as a broadcast licensee to make facilities available for a program presenting views contrasting with those expressed by Dan Smoot.
>
> Have you?

The foregoing was the very first response over the period of over six months, that was received from the DNC to the many letters from WGCB offering time to the DNC on a paid basis. It is to be noted that until this letter, the

Committee had at no time ever specifically said that it did not care to use or to pay for the time. By letter dated February 13, 1965, Rev. Norris wrote the Committee that since the Committee did not want the time, WGCB would be glad to offer time, on the same terms as those offered to the DNC, to anyone suggested by the DNC qualified to answer Mr. Smoot. On February 16, 1965, the Committee replied, stating it knew no one "who would be interested in purchasing time on your station to present views contrasting with those of Mr. Smoot." He stated, however, that he knew where material could be obtained by WGCB at no charge and "perhaps you can find a sponsor to pay to have it broadcast." Rev. Norris was further informed "that the inability to find paid sponsorship does not relieve you of the obligation to make your facilities available for the presentation of contrasting views."

Until the Committee's letter of February 10, 1965 was received,

it appeared to be the Committee's position that *it* was the organization best qualified to respond to the McIntire, Smoot and other broadcasts since it regarded such broadcasts as critical of the Democratic Party and the Democratic Administration. On the previous occasions, it was made clear that "the Democratic National Committee requests time over your facilities" unless affirmative steps had already been taken to present contrasting views. Since the time was requested to reply to a paid broadcast, the station offered time to the DNC on the same basis. Without going into the question of whether the Commission's rulings *required* WGCB to give free time to the DNC or to seek out possible sponsors for reply broadcasts, or failing that, to select someone for reply broadcasts on a free time basis, it is clear that WGCB acted reasonably in attempting to ascertain first from the DNC whether it would pay for reply broadcasts.

(33)

WGCB's policy on requiring payment for time sought in response to paid broadcasts, is not a matter of its own choice but has been dictated by strict economic necessity for survival. WGCB operates in a small community. It is a daytime-only station which must compete for revenues with two fulltime and one daytime station located in the larger community of York (6 miles), and another fulltime station in Hanover (18 miles). It has been at an economic disadvantage because of its limited and fluctuating hours. Until April, 1963, WGCB, being a regional station, had operated for almost thirteen years during pre-sunrise hours, beginning at 5:00 a.m. in the morning. During the pre-sunrise hours, it carried commercial programs which brought it substantial revenues; and a sustaining fifteen

34

minute weekly program called "The Hour of St. Francis", a Catholic religious program,prepared and distributed by the Franciscan Order. On March 14, 1963, WGCB, without any prior notice, received a preemptory telegram from the Commission stating that because of a complaint of undue interference from a station in Worcester, Massachusetts, WGCB must cease pre-sunrise immediately.[1] No copy of the complaint was then, or ever, sent to WGCB by either the Worcester station or the Commission. Under this order, WGCB, after 13 years, immediately stopped operating pre-sunrise and overnight was forced to reorganize its entire programming operations. The revenues lost because of the curtailment of its hours was approximately 10% of its total revenues.

At the time that WGCB's pre-sunrise operations were terminated, the station was carrying three of the syndicated programs about which the DNC has complained re-

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1 The telegram was received just before WGCB's 6:15 P.M. sign-off time. The next morning's pre-sunrise programs were immediately cancelled. Since then, WGCB has been unable to start operating until as late as 7:30 A.M. in January, a loss of 2½ hours a day!

cently. These and other similar programs later added are a much-needed source of revenue to WGCB. For the station to carry certain programs on a paid basis and to give free time for so-called "answering broadcasts" upon the demand of a political organization which is seemingly financially able to pay for such time, particularly during an election campaign and particularly where the organization has not pleaded financial hardship, would simply mean that WGCB would be exposed to similar requests for free time not only from the sponsors of those broadcasts who are now paying for time, but by other political organizations. This could only

35

result in serious losses of revenue to small stations like WGCB and could jeopardize their very existence.

Whatever the personal views of the ownership of WGCB may be on political, social and economic issues, it believes, just as strongly as the Democratic National Committee, that opposing views on controversial issued should be aired. Since September, 1962, Station WGCB has carried a program entitled "Freedom of Speech", in which any member of the public may express his views on any subject, controversial or otherwise.[2] This program is carried Mondays through Fridays, twice a day from 2:20 P.M. to 2:55 P.M., and from 4:45 P.M. to 5:15 P.M. Except for the winter months, when WGCB operates on a short broadcast day and when the later segment of the program must be curtailed, this program serves as a one hour daily forum throughout the year for the expression of all shades of varying viewpoints. This program has regularly served as a vehicle for the expression of views, sometimes strong and vehement, contrary to those which are expressed on the various paid broadcasts to which the DNC has objected.

The program is not pre-taped in advance and there is, of course, no script. Tapes of the program while it is in

[2] The program is locally sponsored.

(35)

progress are not normally made, because of the obviously prohibitive costs. However, WGCB definitely states that, on the Freedom of Speech program, during the past six to eight months, views opposite to those on the McIntire, Smoot, Manion, Life Line and the other sponsored programs to which the DNC has objected, were expressed

36

on the following subjects: Cuban Crisis; Urban Renewal; Civil Rights; Aid to Education; Medicare; Eldercare; U. S. Policy in Vietnam; Nuclear Test Ban Treaty; House Un-American Activities Committee, Co-Existive Peace with Russia; Admission of Red China to the United Nations, and many others. During the last campaign, many persons on this program expressed strong opposition to Senator Goldwater because they believed he was "triggerhappy, and will involve us in a war." Many other examples could be given. In addition, much of the wire copy news that is read verbatim on WGCB frequently includes expressions from government administration sources, Congressmen and other high public officials that are diametrically opposite to views expressed on the programs against which the DNC complains. This was very true in regard to the Nuclear Test Ban Treaty—the wire copy was predominantly and heavily in favor of views supporting ratification of the treaty. Wire copy, as a matter of invariable practice, is not edited by WGCB.

During the recent election campaign, on October 27, the Republican Congressional candidate, who was the then-incumbent, was at Station WGCB at the time of a "Freedom of Speech" broadcast. He was at once invited to appear for fifteen minutes on the program in a question-and-answer session. Immediately thereafter, a written invitation was sent to the opposing Democratic Congressional candidate (who was later elected) to appear on the program in the same way, either on October 29 or October 30. The invitation was not accepted.

37

Finally, it is appropriate to relate, by way of contrast to the apparent position of the DNC in regard to the "fairness doctrine", an experience of WGCB with five national organizations concerned with civil rights. Under date of October 19, 1964, the Congress of Racial Equality, the American Jewish Congress, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Urban League jointly wrote WGCB concerning a "Dan Smoot" Broadcast #458 entitled "Communism in the Civil Rights Movement". WGCB was asked to make time available to the five organizations for reply. Rev. Norris, answering this letter on October 22, 1964, enclosed copies of his letters to the Democratic National Committee, dated July 6, September 15 and October 20 (discussed above), offered the five organizations time for reply on a paid basis, and pointed out the reasons why WGCB could not give free time. Under date of November 2, 1964, the following letter, on the letterhead of the American Civil Liberties Union, was written to Rev. Norris:

> We appreciate your recent letter acknowledging the request of the American Civil Liberties Union, Congress of Racial Equality, National Urban League and the American Jewish Committee for time to reply to the June 1 broadcast of Dan Smoot titled "Communism in the Civil Rights Movement." The groups have asked me to make this combined reply for them.
>
> We are grateful for your consideration of our request and plans are now being made to prepare a reply program. We felt that such a reply should not be finally prepared until we had some idea of the acceptance of our request, but we certainly plan to be in touch with you very soon.

(37)

Thank you again for your understanding of the need to present the fullest discussion of public issues on the air.

/s/ ALAN REITMAN
Associate Director

38

As Rev. Norris stated in his letter to the Commission of February 12, 1965, WGCB stands ready to face the Democratic National Committee at an immediate hearing on this matter.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By_____
JOHN M. NORRIS
President

March 10, 1965

39

Received by the Commission May 3, 1965
As attachment to letter dated April 29, 1965 by KHEP

TRANSCRIPT OF TAPE RECEIVED FROM MR. FRED COOK 3/12/65

I am making this broadcast for two reasons. I want to set the record straight concerning a vicious attack made upon me and I want at the same time to call the attention of those who may have heard it to the technique of smear at the expense of truth. The ostensible reason for the attack by the Reverend Billy James Hargis in late November was a book I had written critical of the presidential candidacy of Senator Barry Goldwater. More than two weeks before the Hargis attack was aired, the American people had spoken and had repudiated the Goldwater candidacy by the most decisive popular vote in American history. Yet this verdict at the polls so freely and decisively given was not to be accepted as a clear plain fact

of life. It had to be explained in a way and the only way fanatics can explain a world that does not agree with their conceptions, in terms of plot and conspiracy. After mentioning me and my book, the Reverend Hargis developed this theme at considerable length attempting to show that persons and publications critical of Goldwater had all been somehow tainted with a virus of *communism*. Having set the scene in this fashion, he encircled back to me in these words—"Now who is Cook? Cook was fired from the New York World Telegram after he had made a false charge publicly on television against an un-named official of a New York City government. New York Publishers and Newsweek magazine for December 7, 1959 showed that Fred Cook and his pal, Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan." Observe the technique now employed here. This paragraph plainly says that I and my reporting partner together concocted a false story and it insinuates that I admitted this to District Attorney Hogan. As proof, it offers a specific reference to an accredited source, in this instance, Newsweek magazine. Now the one authority here is obviously District Attorney Hogan. After the Hargis attack, I wrote Mr. Hogan asking for a simple statement of the facts as they concerned me. He replied in a letter December 9, 1964. I quote,

> "Dear Mr. Cook: In reply to your letter dated December 7, 1964, I wish to state that this office did not make any statement reflecting on your integrity at a press conference on November 23, 1959 concerning Mr. Eugene Gleason, formerly a reporter for the New York World Telegram and Sun; nor for that matter, have we made such a statement at any time."
>
> "Mr. Gleason not only admitted in our office that the charge was untrue, but also completely exonerated you of all responsibility for the false accusation made on the television program."

(39)

Those are the facts. They could have been easily ascertained by anyone desiring the truth. But what about the issue of Newsweek magazine that the Reverend Hargis cited? Those who heard him had no way of knowing, of course, that Newsweek did not say anything like what it was alleged to have said. I cannot stress too strongly that this is the tactic typical of a demagogue. To make a sensational charge, bolstering it with a citation of an honorable source, secure in the knowledge that his deceived listeners will accept, not check. Well, I invite my many listeners to go to the libraries and check the issue of Newsweek for December 7, 1959. They will find it agrees in all essentials with the summary of this affair I am giving you now. Gleason and I were a pair of crusading reporters who have been exposing corruption in New York City government. It would have been easier to live and let live without taking the risk we took, but no matter. Gleason, the reporting half of our team, the man on the street, came back to me on one occasion, and reported that we had been offered what amounted to a $5,000 annual bribe to go easy and to lay off. I told him, and he agreed, to turn down the offer instantly. Subsequently on a television program, I made a reference to this, and my partner under questioning, weakened and confessed he had exaggerated.

40

I was probably the most stunned man in New York when this happened, and a Newsweek article reflects that. It also reported that I was, quote—"A sympathic figure" to many of my colleagues. Now I ask you, would you get any idea of this from the Reverend Hargis' distorted version. And if you agree you would not, if you agree, that the Reverend Hargis stooped in misrepresentation in this case, how much credence can you give to similar charges that he makes constantly against others. I have made this broadcast both to expose the falsity of the Reverend

Hargis' charges concerning me and the technique used in making them. But the basic issue is far more important than I am. It is very simply facts and truth versus the technique of smear, inuendo, the discrediting of a man by a label. We live in a time of crisis, in an age of complicated decisions. Those decisions should be made on a basis of facts and reason, not on the basis of labels designed to blot out facts and reasons and not on the basis of the distortions of a demagogue.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO., INC., ETC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Action of the Federal Communications Commission

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Decided November 22, 1966

Mr. Robert E. Manuel, with whom *Mr. Thomas B. Sweeney* was on the brief, for petitioners.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Assistant Attorney General Turner, Messrs. John H. Conlin,* Associate General Counsel, *Robert D. Hadl,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and FAHY and TAMM, *Circuit Judges.*

WILBUR K. MILLER, *Senior Circuit Judge:* In November, 1964, the petitioner's radio station, WGCB, broadcast a

paid program called "Christian Crusade," which included a discussion of the 1964 presidential election and of a book written by Fred J. Cook. The speaker, Billy James Hargis, in the course of his remarks, said:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Cook complained to the Commission that WGCB had not notified him that this attack would be made, did not furnish him with a transcript or summary either before or after the program was broadcast, and refused his request for free time to respond. The petitioner had offered Cook time to reply to Hargis and had agreed to waive its customary charge therefor if Cook simply stated he was unable to pay for such a broadcast. Cook refused to say he was unable to pay, and insisted he was entitled to free time for reply, even if he could pay for the time involved.

On October 6, 1965, the Commission addressed a letter to the petitioner in which it said that a broadcaster must afford free time to reply to one who has been attacked as to his honesty, integrity or character and that, in the circumstances, Cook did not "have to make any showing or representation that he is financially unable to sponsor or pay for his reply time." The letter ended thus:

> "Accordingly, you are requested to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to the situation."

Red Lion requested reconsideration of this letter but, in another letter dated December 9, 1965, the Commission declined to reconsider. It reiterated its legal position, but did not order the petitioner to take any action. In fact,

no order of any kind has ever been entered in this matter. The effect of the December 9 letter was that the Commission was again requesting the petitioner "to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to this situation." The Commission has done nothing except, in informal correspondence, to expound its view on legal questions and to request a reply from Red Lion.

Red Lion appeals from the Commission's letter of December 9, 1965, which, it erroneously says, "ordered appellants to grant Mr. Fred J. Cook the free broadcasting time as demanded in his complaint to the said Commission."

In considering this matter, we are confronted by the threshold question whether the Commission's letters of October 6 and December 9 were final orders from which an appeal may be taken or judicial review sought. Pursuant to our invitation, the parties have submitted memoranda on the question in which they agree that the Commission's letters constitute final appealable orders. Their agreement does not end the inquiry, however, for the parties to a proceeding may not confer jurisdiction on a court where none exists. It is our duty to examine the question and decide whether jurisdiction exists, regardless of the parties' agreement that it does.

As we have said, all the Commission has done is to declare its position on legal questions and to request Red Lion "to advise the Commission of your plans to comply with the 'fairness doctrine', ..." Red Lion has not complied with the Commission's request and the Commission has done nothing further—it has not entered an order directing Red Lion to comply. We said in *California Oregon Power Co.* v. *Federal Power Comm'n*, 97 U. S. App. D. C. 263, 270, 239 F. (2d) 426, 433 (1956),

> "In all cases held reviewable, something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something. . . ."

Here nothing has been done to Red Lion and it has been placed under no obligation to do anything. It has merely been requested to advise the Commission of its plans.

We hold that the Commission's letters do not amount to final appealable orders and in fact are not orders at all. The Commission itself does not refer to them as orders but merely as declaratory rulings. It bases its right to issue such rulings upon Section 1.2 of the Commission's Rules, which provides:

> "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

The trouble with the foregoing Rule is that it is not in accordance with Section 5(d) of the Administrative Procedure Act, 5 U. S. C. § 1004(d), which is as follows:

> "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Thus it is seen that in formulating Section 1.2 of its Rules, the Commission went further than does the statute and attempted to give itself power to issue a declaratory ruling, such as those involved here, by substituting the word "ruling" for the word "order" in the statute. The Commission could not have regarded the words "ruling" and "order" as synonymous, for in that event it would have been unnecessary to discard the statutory word and choose another. It is quite apparent that the Commission's language in Section 1.2 of its Rules was a conscious effort to enlarge the authority given to it by the statute. This it may not do. We regard Section 1.2 of the Commission's Rules as null and void, and hold, therefore, that it furnishes no basis for the issuance of the letters of October 6 and December 9.

From what has been said, it follows that the declaratory rulings contained in the Commission's letters are not

orders from which an appeal may be taken or judicial review sought, and that this court has no jurisdiction to entertain this petition.

Petition dismissed.

FAHY, *Circuit Judge, dissenting:* The case presents a problem concerning the finality of action of the Federal Communications Commission required to give this court jurisdiction of a petition to review a Commission order under Section 402(a) of the Federal Communications Act of 1934,[1] Section 10(c) and (e) of the Administrative Procedure Act of 1946,[2] and Section 1032, Title 5 U.S.C.[3] This jurisdictional question was not presented by the parties when the case was briefed and submitted. Thereafter the court sua sponte requested memoranda on the question. Petitioners[4] and respondents complied, all urging that the Commission action sought to be reviewed is final. Though the parties cannot by consent confer jurisdiction I think their position that we have jurisdiction is sound.

By letter of March 22, 1965, the Commission informed Red Lion of a complaint, entered by Mr. Fred J. Cook,

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[1] 48 Stat. 1093, as amended, 47 U.S.C. § 402(a) (1964):

> (A) Any proceeding, to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 19A of Title 5.

[2] 60 Stat. 242, 5 U.S.C. 1009(c), (e) (1964).

[3] 64 Stat. 1129 (1950).

[4] Petitioners are Red Lion Broadcasting Co., Inc. and Reverend John M. Norris, as president, 80% stockholder, and individually. They are referred to herein as Red Lion.

which might entitle Mr. Cook to radio reply time in accordance with the Commission's "fairness doctrine." Red Lion responded that free time would be made available only if Mr. Cook were unable to finance his reply. Then by letter of October 6, 1965, the Commission set forth the facts giving rise to Mr. Cook's request for reply time, Red Lion's denial thereof, and the requirements of the fairness doctrine. The letter concluded by requesting that Red Lion "advise the Commission of your plans to comply with the 'fairness doctrine,' applicable to the situation." Red Lion responded under date of November 8, 1965. It advised the Commission that it understood from the letter of October 6 that the Commission had directed Red Lion to provide Mr. Cook with free broadcast time to answer the alleged personal attack upon him which had given rise to the fairness doctrine issue. Red Lion referred to the Commission's rejection of its proposal to offer the free time upon Mr. Cook's statement that he was unable to pay for such a broadcast, and, further, requested advice as to the time for complying with "the Commission's directive." It also pointed out that in a court proceeding in the District of Columbia between Red Lion as plaintiff and the Commission and others as defendants, the Commission and the United States had referred to the Commission's letter of October 6, 1965, as constituting a final order. Red Lion stated that this apparently indicated that it was under a mandate from the Commission which if not complied with might subject it to revocation, forfeitures and possibly other penalties. The letter concluded:

> [W]e ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us of October 6, 1965.

Under date of December 9, 1965, the Commission responded. It reviewed Red Lion's contentions, adhered to its prior ruling, and stated:

The ruling is a "final order," in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision.

The letters of December 9 and October 6 placed Red Lion under obligation to comply as directed by the Commission if the Commission's action were valid. This I think constituted an order reviewable by this court. Though it were not described as an order, that would not be decisive.[5] The fact is, however, the Commission in its letter of December 9 to Red Lion described its ruling as an order. Moreover, it is a ruling which comes within the provisions of Section 5(d) of the Administrative Procedure Act, which read:

> The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

This provision is carried into the Commission's rules, Section 1.2, in the following language:

> The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

47 C.F.R. § 1.2.

The Commission's use in this regulation of "declaratory ruling" rather than "declaratory order" does not prevent a ruling under the regulation from being a declaratory order within the meaning of Section 5(d).

All parties, including the one against whom the ruling was made, understood that the Commission had decided

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[5] "'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing." Administrative Procedure Act of 1946, § 1(d), 60 Stat. 237, 5 U.S.C. 1001(d) (1964).

finally that Red Lion was under obligation to comply with the fairness doctrine, and had so notified Red Lion. This understanding is material on the interpretation to be given to the ruling. In any event the final decision placing Red Lion under obligation to comply is all that was required to bring the ruling within the court's jurisdiction on Red Lion's petition to review the ruling as an order.

The position maintained by the parties, with which I agree, finds support in *Isbrandtsen Co.* v. *United States*, 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55; *Brigham* v. *FCC*, 276 F.2d 828 (5th Cir.); *cf. Frozen Foods Express* v. *United States*, 351 U.S. 40.

In *Isbrandtsen* it is said:

> Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Thus, administrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." Under this test, a final order need not necessarily be the very last order. [Footnotes omitted.]

I respectfully dissent from dismissal for lack of jurisdiction.

[Filed Nov. 22, 1966]

[Caption omitted]

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the petition for review of the action of the Federal Communications Commission is hereby dismissed.

Per Senior Circuit Judge Wilbur K. Miller

Dated: November 22, 1966

Separate dissenting opinion by Circuit Judge Fahy.

Vacated by order of the court 3/13/67

[Filed Mar. 13, 1967]

[Caption omitted]

Order

On consideration of respondents' petition for rehearing *en banc* and petitioners' answer thereto, it is

ORDERED by the court *en banc* that the opinions and judgment filed herein on November 22, 1966, be vacated and this case shall remain with the assigned division of the court for a decision on the merits of the petition for review filed herein.

Per Curiam.

Circuit Judge Robinson did not participate in the foregoing order.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO., INC., et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
RESPONDENTS

On Petition to Review and Set Aside an Order of the Federal Communications Commission

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Decided June 13, 1967

Mr. Robert E. Manuel, with whom *Mr. Thomas B. Sweeney* was on the brief, for petitioners.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Assistant Attorney General Turner, Messrs. John H. Conlin,* Associate General Counsel, *Robert D. Hadl,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Before WILBUR K. MILLER, *Senior Circuit Judge,* FAHY* and TAMM, *Circuit Judges.*

The action of the Federal Communications Commission is affirmed. Circuit Judge Tamm files an opinion. Circuit Judge Fahy files a separate opinion. Senior Circuit Judge Miller notes his non-participation in the consideration and decision of the case on the merits.

TAMM, *Circuit Judge:*

I. Earlier Proceedings in This Court.

Argument of this case, after a full briefing schedule, was conducted before this panel of the court on September 26, 1966. With Judge Fahy dissenting, the panel concluded that the "declaratory rulings contained in the Commission's letters are not orders from which an appeal may be taken or judicial review sought," and dismissed petitioners' action. Thereafter, the United States and the Federal Communications Commission petitioned for an en banc rehearing of the case, and a majority of the court voted in favor of the granting of this petition to rehear. A majority of the court, then en banc, voted to vacate the opinions and judgment filed by the panel on November 22, 1966, and directed the assigned division to consider the petitioners' action upon the merits.[1]

II. The Issues Presented.

A prehearing stipulation approved by the court in a prehearing order dated March 9, 1965, defined the issues agreed to by the parties to be:

1. Whether section 315 of the Communications Act of 1934, as amended in 1959,[2] adopted the Com-

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* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

[1] See court order filed with this court's clerk on March 13, 1967.

[2] Equal Time Act, 47 U.S.C. § 315 (1962); *amending* 48 Stat. 1088 (1934).

mission's "Fairness Doctrine" as set forth in the Commission's 1949 *Report, Editorializing by Broadcast Licensees,*[3] and if so, whether section 315 constitutes an unconstitutional delegation of Congress' legislative function.

2. Whether the Fairness Doctrine, as set forth above, is unconstitutionally vague, indefinite, uncertain, and lacks the precision required when legislation which affects the basic freedoms guaranteed by the Bill of Rights is adopted.
3. Whether section 315, as stated in (1) above, violates the ninth and tenth amendments to the Constitution.
4. Whether the Fairness Doctrine violates the first and fifth amendments to the Constitution and, particularly, whether under the facts of this case the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the first and fifth amendments to the Constitution.

III. Identity of Petitioners and Factual Background Creating the Present Controversy.

Petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. In November 1964, petitioners broadcast a fifteen minute program by a Reverend Billy James Hargis as part of a program series entitled, *The Christian Crusade.* The program included a discussion of the 1964 presidential election and a book concerning the Republican campaign entitled, *Goldwater—Extremist on the Right,* written by Mr. Fred J. Cook. During the course of the program and as part of the broadcast, Reverend Hargis made the following statements concerning Mr. Cook.

"Now who is Cook? Cook was fired from the New

[3] *Report of the Commission in the Matter of Editorializing by Broadcast Licensees.* 13 F.C.C. 1246 (1949).

> York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation* * * *. Now among other things, Fred Cook wrote for *The Nation* was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist Of The Right.*"

Thereafter, Fred J. Cook wrote a letter to Radio Station WGCB inquiring whether Reverend Hargis had, in fact, made the above remarks. Cook requested time to reply to the Hargis remarks if they had, in fact, been made and specifically requested that the reply time be furnished at the expense of WGCB. In response, WGCB furnished Cook with its rate card so that he could arrange for the time he might wish to purchase and furnished him copies of letters which it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. A further exchange of letters occurred, after which, Cook filed a complaint with the Federal Communications Commission. In his complaint, Cook charged that Radio Station WGCB had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. Cook also charged WGCB was insisting upon payment from him for any reply broadcast. The Commission brought the complaint to the attention of Radio Station WGCB and requested an answer within twenty days. As a result of this letter, additional letters were exchanged between the radio station and the Commission. To permit

a full understanding of the resulting controversy, the pertinent letters are quoted below in their entirety as they were reproduced in the Joint Appendix filed by the parties in this case.

AM WGCB FM
BOX 88
RED LION, PENNA.

May 19, 1965

Mr. Ben Waple Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Mr. Fred J. Cook;
Your ref. #8425-A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WCGB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to "sponsor" or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge

publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.,* FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

AM WGCB FM
BOX 88
RED LION, PENNA.

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion-Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Demo-

cratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation,* a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cooke free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to

give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris, *Vice President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation,* entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.,* FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controver-

sial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19). Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is will-

ing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief

filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seeks clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F.2d 828, 829 (C.A. 5); *Fadell* v. *U.S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.,* 243 F.2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal

attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

A formal order of the Commission, issued December 10, 1965, recited the addressing of the December 9 letter to the Reverend John H. Norris.

Petitioners thereafter filed in this court their petition to review the Commission's action. Petitioners' action constitutes the first direct court attack on constitutional grounds upon the Fairness Doctrine promulgated and executed by the Commission. It is to be noted, however, that this court has recently considered another case involving the Fairness Doctrine. See *Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

IV. Genesis of the Fairness Doctrine.

Mr. Justice Frankfurter, speaking for the Supreme Court in the landmark case of *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), succinctly but accurately outlined and documented the origin, development, and necessity for federal regulation of radio, which culminated in the Radio Act of 1927.[4]

The initial concept of a fairness doctrine certainly had its beginning in this Act, which first required that radio stations allot for campaign purposes equal time to opposing political candidates.[5] Two years later, the Federal Radio Commission extended the coverage of this statutory provision to all discussions of issues of importance to the public, *Great Lakes Broadcasting Company* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 59 App. D.C. 197, 37 F.2d 993 (1930), *cert. dismissed,* 281 U.S. 706 (1930). Further implementation of the policy took the form of denial of licenses to radio stations using, or proposing to use, their facilities

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[4] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

[5] *Id,* Sec. 18, at 1170.

for the presentation of but one point of view. *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F.2d 850 (1932), *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission*, 60 App. D.C. 79, 47 F.2d 670 (1931); *Chicago Federation of Labor* v. *Federal Radio Commission*, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 59 App. D.C. 333, 41 F.2d 422 (1930); *Great Lakes Broadcasting Company* v. *Federal Radio Commission, supra.*

The basic provisions of the Radio Act of 1927[6] were incorporated into the Communications Act of 1934,[7] within which was created the Federal Communications Commission.[8]

> "By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). (Footnotes omitted.)

Early in its existence, the Federal Communications Commission expressed approval of the policy established by the Radio Commission when, in *Young Peoples Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1938), it denied application for a construction permit because of the applicant's policy of refusing to permit use of its broadcast facilities for the presenting of any viewpoint differing from that of the applicant.

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[6] See note 4, *supra.*

[7] Act of June 19, 1934, ch. 652, 48 Stat. 1064.

[8] 47 U.S.C. § 151 (1962).

Thereafter, the Commission adhered to the doctrine so established and, in fact, broadened the scope of its coverage, *Laurence W. Harry,* 13 F.C.C. 23 (1948); *WBNX Broadcasting Co.,* 12 F.C.C. 805 (1948); *Robert Harold Scott,* 3 P & F Radio Reg. 259 (1946); *United Broadcasting Co.,* 10 F.C.C. 515 (1945); *Mayflower Broadcasting Corp.,* 8 F.C.C. 333 (1941).

Chronologically at this point, the Commission initiated public hearings designed to reappraise and clarify the Fairness Doctrine. The hearings resulted in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, [hereafter referred to as the *Report*]. The *Report,* in effect, codifies earlier Radio Commission rulings, pre-*Report* rulings of the Federal Communications Commission, and the Commission's accumulated experience in fairness problems, crystallized after public hearings into a basic statement of the then scope of the Fairness Doctrine. Characterizing the broadcasters as "trustees" (*Id.* at 1247), who operate their facilities for the public at large, the *Report* promulgated the requirement that broadcasters, while permitted to editorialize, must seek a reasonably balanced presentation of all viewpoints on public issues of controversial importance.

The *Report* considered and discussed in considerable detail the Commission's authority to administer the Act under the statutory mandate of serving only the public interest, convenience, and necessity, 47 U.S.C. §§ 307a, 309 (1962), as well as the statutory prohibition of the Commission's power of censorship, 47 U.S.C. § 326 (1962).

Detailed quotation of these facets of the *Report's* contents is unnecessary for understanding of the chronology being here outlined. It suffices to say that in sum total the *Report* concluded that licensees of broadcast facilities, authorized to use but not to own, prescribed channels of transmission for a limited time, were required to devote a reasonable percentage of their broadcasting time to the

discussion of public issues of controversial importance. Moreover, the *Report* concluded that implicit in this requirement was the obligation to design and present this type of programming in such a manner that the public was afforded the opportunity to hear different and opposing positions and viewpoints on these public issues.

Noteworthy at this point is the fact that while the *Report* was based fundamentally upon the public interest standard and related statements in the Communications Act of 1934,[9] that Act substantially retained the provisions of the Radio Act of 1927 [10] relating to the allocation of equal broadcast time to opposing political candidates for public office.

A congressional inquiry into the application and operation of the Fairness Doctrine was undertaken in 1959 and resulted in the amendment of section 315.[11]

This congressional action was triggered by the Commission's rulings in interpreting the application of the then section 315 and the Fairness Doctrine to newscasts of political events by Chicago television stations, *Lar Daly*, 18 P & F Radio Reg. 238, *aff'd on reconsideration*, 18 P & F Radio Reg. 701 (1959). Congressional consideration of proposed amendments to section 315 grew out of dissimilar bills introduced in the Senate [12] and the House of Representatives.[13] The differences in the bills passed by each chamber resulted in the designation of a conference committee.[14] The resulting conference accomplished the clari-

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[9] See note 7, *supra*.

[10] See note 4, *supra*.

[11] See note 2, *supra*.

[12] S. 2424, 86th Cong., 1st Sess. (1959).

[13] H.R. 7985, 86th Cong., 1st Sess. (1959).

[14] 105 Cong. Rec. 16160, 16375, 16588 (1959).

fication of conflicting provisions of the proposed amendment of section 315 and the enactment of that section in its present phraseology.

Subsequent to the 1959 amendment of section 315, the Commission dealt with occurring problems and questions arising under the Fairness Doctrine on an ad hoc basis, as it had forecast in the *Report,* at page 1256. This experience with respect to fairness complaints resulted, on July 25, 1963, in the Commission's mailing to all broadcast licensees a Public Notice reiterating the obligation of all broadcasters to comply with the Fairness Doctrine, 25 P & F Radio Reg. 1899 (1963). This Public Notice stressed three factual situations arising under the Fairness Doctrine, including the licensee's obligation when a personal attack was broadcast, and specifically stated:

> "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer, RR 951, 953)." 25 P & F Radio Reg. at 1900.

The Public Notice further advised licensees that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, would be appropriate in better defining a licensee's responsibilities under the Fairness Doctrine. The resulting study culminated on July 1, 1964, in a Public Notice identified as the *Fairness Primer,* 29 Fed. Reg. 10415 (1964). Although the Commission had earlier defined and elaborated on its procedures for handling fairness complaints, *Letter to Oren Harris,* 3 P & F Radio Reg. 2d 163 (1963), the *Primer,* after digesting its rulings on the Fairness Doctrine, reiterated the policy of dealing with each complaint on an ad hoc basis but also specifically set forth that in com-

plaints warranting Commission consideration the licensee would be afforded an opportunity to take action or to comment upon the complaint prior to disposition of the matter by the Commission, 29 Fed. Reg., at 10416.

Especially of interest in the present proceeding is the fact that the *Fairness Primer* contained a separate section devoted to the personal attack principle, 29 Fed. Reg. 10420-1. In substance, this section required all licensees in broadcasts attacking an individual's or a group's integrity, character, honesty, or personal qualities, in connection with controversial issues of public importance to take all appropriate steps to afford the person or persons attacked the fullest opportunity to respond.

I will now discuss, in the order in which they are enumerated in section II of this opinion, the several grounds upon which petitioners attack the Commission's action in the present case.

Discussion of the Four Stipulated Issues.

V. Did section 315 of the Communications Act of 1934, as amended in 1959, adopt the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report*, and if so, does section 315 constitute an unconstitutional delegation of Congress' legislative function?

In essence, petitioners charge that section 315 of the Act constitutes an unlawful delegation to the Commission of congressional legislative power. They argue, quoting from *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964), ". . . precision must be the touchstone of legislation so affecting basic freedoms . . ." and affix this quotation to their contention that the Fairness Doctrine infringes on constitutional guarantees secured by the Bill of Rights. Selecting from section 315 and from the Public Notice of July 1, 1964, *supra*, at 10415, such phrases as "reasonable opportunity," "sufficient time for full discussion"

of "controversial issues of public importance," "substantial importance to the community," "contrasting views of all reasonable elements," "of sufficient importance to be afforded radio time," "primary controversy," "affirmative duty generally to encourage and implement the broadcast of all sides of controversial issues," "shades of opinion," petitioners argue that Congress has illegally delegated its legislative authority because of the absence of adequate standards or ascertainable criteria and that Congress cannot adopt and make a part of the statute regulations of the Commission which, in turn, fail to meet the "preciseness" required in legislation affecting basic freedoms, citing *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438 (1963).

The factual and legal elements involved in *Aptheker* v. *Secretary of State, supra,* can be immediately distinguished from those elements found in the present case. In *Aptheker,* which involved travel restrictions upon members of the Communist Party, the challenged statute governed knowing as well as unknowing conduct. It lacked ". . . criteria linking the bare fact of [Communist Party] membership to the individual's knowledge, activity or commitment." 378 U.S. at 511. The challenged statute created an *"irrebuttable presumption* that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States," 378 U.S. at 511, and excluded "other considerations which might more closely relate the *denial of passports to the stated purpose of the legislation,"* 378 U.S. at 511, (emphasis supplied) (footnotes omitted). The Supreme Court, then, was compelled to find that the statutory provision *"judged by its plain import and the substantive evil which Congress sought to control,* sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and was not patterned as a regulation "narrowly drawn to prevent the supposed evil." 378 U.S. at 514, (emphasis supplied).

In contrast, the court has in the present case a statute and Commission regulations growing out of a licensing program addressed to the serving of the "public interest, convenience or necessity," 47 U.S.C. 307(a) (1962). The acceptance of this standard as a valid basis for the legislative grant of administrative power has been repeatedly upheld; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 89-91 (1953); *National Broadcasting Co.* v. *United States, supra; Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* at 138; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276, 285 (1933); *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24-25 (1932). Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct. The court is dealing now with a set of reasonably concise and specifically enumerated prohibitions addressed to the evils they seek to guard against. See *Report, supra,* 47 U.S.C. § 315 (1962), and the *Fairness Primer, supra.* There are in this case no "irrebuttable presumptions," since provisions are afforded for the subjects of complaints to have an opportunity to comment or take action on a complaint before administrative action of the Commission. Most obviously the statutory provision, judged by its plain import and the substantive evil which Congress sought to control, is far removed from the stain of illegality found by the Supreme Court, speaking in *Aptheker, supra,* to exist in section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1951).

Turning to the substance of petitioners' argument under this heading, I observe the standard of evaluation of an exercise of its legislative power by the Congress to be whether "Congress has stated the legislative objective, has prescribed the method of achieving that objective . . . and has laid down standards to guide the administrative determination . . . ." *Yakus* v. *United States,* 321 U.S.

414, 423 (1944), and cases cited therein. There the Court also said:

> "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
>
> "Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative comm[illegible]d." *Yakus* v. *United States*, at 424-5.

There appears to be no doubt but that the Supreme Court's references in *Yakus* to "an administrative officer" would apply equally and without qualification to a duly constituted administrative agency.

In reviewing the provisions of Title 47 U.S.C., I find clearly defined and explicitly enumerated statements of the legislative objectives, the enumeration of the method of achieving those objectives (*id est*, the creation of the Federal Communications Commission and the assignment

to it of specific and enumerated duties, responsibilities, and obligations), and the establishment of standards to guide the administrative determination. See section 309, "Application for license—Considerations in granting applications;" section 310, "Alien ownership as barring station license; assignment and transfer of construction permit or station license;" section 311, "Requirements as to certain applications in the broadcasting service—Notice of filing and hearing; form and contents;" section 312, "Administrative sanctions—Revocation of station license or construction permit;" and other similar sections.

Within the framework of 47 U.S.C. §§ 151-319 (1962), I find a full and complete determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. Relating these specifically to the provisions of section 315, I find in this portion of the statute a permissible delegation to the Commission of the "determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly and legally empowering "the exercise of judgment." This allowable assignment of authority and responsibility, *Fairness Primer,* 29 Fed. Reg. 10415, constitutes a valid and proper formation of subsidiary administrative policy within the prescribed statutory framework.

Continuing to petitioners' charge that the Fairness Doctrine lacks the preciseness required in statutes "affecting basic freedoms." *N.A.A.C.P.* v. *Button, supra,* the Supreme Court, speaking in *National Broadcasting Co.* v. *United States, supra,* has effectively answered this question when it stated:

> "The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138. 'This criterion is not

to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . . *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285." 319 U.S. at 216.

Since the "public interest" is by statute and court decision a valid standard for the Commission's guidance, I find the necessary precision required by *Aptheker* in the situation arising in the present case. I conclude that the adoption by Congress of the Commission's Fairness Doctrine in its 1959 amendment of section 315 of the Communications Act of 1934 does not constitute an unconstitutional delegation of Congress' legislative function.

VI. Is the Fairness Doctrine unconstitutionally vague, indefinite, uncertain and/or lacking the precision which legislation affecting the basic freedoms guaranteed by the Bill of Rights requires?

Obviously, this question overlaps the discussion of the prior question, and petitioners' brief, as well as respondents' brief, duplicate in some measure the discussion of the present subheading and that of subheading V above. Again, from the starting point of the *Aptheker* case, *supra*, the petitioners, finding in their present situation a possible sanction, *id est*, the forfeiture of a valuable right to operate a radio station, seek solace from the fact that *Aptheker* involved penal sanctions. Claiming violation of their constitutional rights under the first and fifth amendments to the Constitution, petitioners argue that in applying the Fairness Doctrine to them, the Commission, having failed first to ascertain the truth of Cook's charges against them but requiring them, nevertheless, to afford Cook free time to reply to the Hargis broadcast, is abrogating their right to free speech in the dissemination of truth, if the

Hargis charges against Cook are, in fact, true. Continuing their argument to the allegation of a due process infringement, petitioners contend that the vagueness in the Fairness Doctrine, as it is herein invoked against them, violates the first essential of due process of law in violation of the fifth amendment. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

As noted earlier, this case presents the first direct challenge to the constitutionality of the Fairness Doctrine, although we took passing notice of it recently by observing ". . . that adherence to the fairness doctrine is a *sine qua non* of every licensee." *Office of Communication of the United Church of Christ* v. *Federal Communications Commission, supra,* 123 U.S. App. D.C. at 343, 359 F.2d at 1009.

The first amendment extends, of course, to broadcasting, as well as to other media of expression. *National Broadcasting Co.* v. *United States, supra,* but "(u)nlike other modes of expression radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to government regulation." 319 U.S. at 226. This court has had not infrequent occasions to consider first amendment challenges to various actions of the Commission. Thus, in *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 123 U.S. App. D.C. 300, 352 F.2d 729 (1965), we rejected the contention that the imposition of a non duplication condition upon a licensee was violative of the first amendment. Earlier, speaking in *Carter Mountain Transmission Corporation* v. *Federal Communications Commission,* 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied,* 375 U.S. 951 (1963), we rejected appellant's contention that the first amendment guaranteed the use of all means of public communication free of restraint or denial imposed by the Commission's ruling. Similarly, in *Henry* v. *Federal Communications Commis-*

sion, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), *cert. denied,* 371 U.S. 821 (1962), we denied a contention that the constitutional guarantee of free speech was abridged by a Commission ruling denying a license application upon the ground that the program proposals of the applicant were not designed to serve the needs of the proposed area. This court has made similar rulings in *Johnston Broadcasting Company* v. *Federal Communications Commission,* 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); *Bay State Beacon, Inc.* v. *Federal Communications Commission,* 84 U.S. App.D.C. 216, 171 F.2d 826 (1948); and in *Simmons* v. *Federal Communications Commission,* 83 U.S. App. D.C. 262, 169 F.2d 670 (1948), *cert. denied,* 335 U.S. 846 (1948).

It appears to be well documented, then, that because of its unique characteristics the courts have consistently held that regulatory action by the Commission, acting within the framework and provisions of the statutes embraced in Title 47 U.S.C., does not per se violate the first amendment.

Looking specifically to the actual operation of the Fairness Doctrine as applied to these petitioners in this present case, I observe, first of all, that petitioners are not prohibited from broadcasting any program which petitioners think suitable. Moreover, petitioners are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting. The latitude of petitioners' operation of their station insofar as programming is concerned is limited only by petitioners' discretion and good faith judgment. See *Commission's Policy on Programming,* 20 P & F Radio Reg. 1901 (1960) and the *Report, supra.*

The Fairness Doctrine impact arises, then, when in petitioners' exercise of their own judgment, they broadcast a program dealing with controversial issues of public importance. After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unre-

stricted programming, the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast. Such an attack, the Doctrine directs, necessitates the petitioners' affording the maligned victim an opportunity to respond. Does such an obligation arising under these conditions deprive petitioners of any right guaranteed by the first amendment? I think not.

The American people own the broadcast frequencies. Speaking through their elected representatives in Congress, they have established a program of licensing the temporary use of allocated frequencies to broadcasters who meet the standards established by Congress in Title 47 U.S.C. as administered thereunder by the Commission. The broadcasters, then, acquire no ownership of assigned channels but are authorized to use them for the service of the public interest, convenience, or necessity. In keeping with the public interest, I agree with the Commission that:

> "It would be inconsistent . . . to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307(a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, *may themselves make radio unavailable as a medium of free speech.*" *Report, supra,* at 1248. (Emphasis supplied.)

Although addressing itself to a Sherman Act situation involving newspaper services, the Supreme Court's admonition in *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), appears to me equally applicable with minor changes in syntax to the present case:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted

> adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

My conclusion in this regard is uninfluenced by petitioners' contention that the Commission in some manner has an obligation to first ascertain whether the complaint made to the Commission by Cook was "in fact true or false." There is, of course, no statutory requirement for such a finding. Additionally, it is my view that any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute an illegal exercise of a nonexistent authority. The basic concept of free speech is unfettered by any requirement that it be exercised only by those with a "right" viewpoint:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire*, *supra*, pp. 571-572, [316 U.S. 568], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1948).

I reject the suggestion that the Commission has either the obligation, or even the authority, to make determinations of the right or wrong in factual disputes involving controversial issues of public interest.

The thrust of petitioners' challenge to the Commission action as an abridgement of their fifth amendment rights is rather difficult to specifically articulate. Briefing and argument combine and interweave the vagueness argument indistinguishably about both the first and fifth amendments. Specifically, we are told that arguments advanced by petitioners in support of the questions discussed in part V of this opinion also support the allegation that the "vice of vagueness violates the due process clause of the Fifth Amendment . . . ." (Petitioners' brief at 17.) As I have set forth under part V of this opinion, I do not believe that either the Fairness Doctrine or the statutory provisions from which it flows are lacking in any required standards of preciseness. My view is that the statutes and the Doctrine are sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to penalties. Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1925). Moreover, broadcasters are protected against the abuse of power by the Commission by the procedural safeguards of Title 47 U.S.C., by the provisions of the Administrative Procedure Act,[15] and finally, by the right of appeal to the courts for relief from any final action claimed to be arbitrary or capricious. The petitioners are not deprived of due process by the operation of the Fairness Doctrine.

VII. Does section 315 violate the ninth and tenth amendments to the Constitution?

In four sentences in their brief (p. 20) petitioners assert that the Fairness Doctrine infringes upon the rights guaranteed by the ninth and tenth amendments. Relying upon

[15] 5 U.S.C. §§ 1001-1011 (1950).

United Public Workers v. *Mitchell*, 330 U.S. 74, 94 (1947), petitioners point out that there is therein an explicit protection of the right of the people to engage in political activity. The argument then disclaims this case as representing any authority for "so restricting the rights of the people generally or the owners or users of media of communications such as radio or the press." The conclusion is drawn that the "prior restraint occasioned by the imposition of the 'Fairness Doctrine' infringes on the guarantee of the political rights retained by the people including petitioners herein and all paying users of Petitioners' radio facilities," and "the First Amendment's prohibitions clearly fall within the Tenth Amendment" as "powers not delegated to the United States by the Constitution are retained by the people." See petitioners' brief at page 20.

Again I encounter some difficulty in applying these general allegations to the facts in this case. Accepting *United Public Workers* v. *Mitchell, supra,* with some obvious limitations, for the principle announced by petitioners, I find little in the actual holdings of the Court as to the rights of federal employees under the Hatch Act which relates to the factual situation here before us. I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities, as I pointed out in some detail in part VI above. Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in those broadcasts. In political matters, the licensee alone has "the right and non-delegable duty of . . . acting reasonably to determine whether a program . . . is in the public interest." *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 906 (10th Cir. 1947). While generally a licensee is responsible for all matter carried on his station, Congress has gone so far as to relieve him of this responsibility with

respect to broadcasts by candidates for political office by stripping him of his power to censor. See section 315 and *Farmers Union* v. *WDAY*, 360 U.S. 529 (1959).

The Commission, in supporting its action in this case, construes petitioners' challenge under this point as being addressed to its requirements imposed on the licensees after the personal attack, with special reference to the mandated granting of cost-free time to the victim to respond as his financial circumstances require. If this is the thrust of petitioners' charge, I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one. The broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust. There remains to the licensee the right, in the exercise of good faith discretion, of utilizing a paying spokesman to respond to a personal attack if one is available. But:

> ". . . [W]here the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (and does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation." (Emphasis in original.) *Cullman Broadcasting Co., Inc.*, 25 P & F Radio Reg. 895, 896 (1963).

I conclude that there is no abridgement of petitioners' rights in the application of the Fairness Doctrine to their activities in this case. In so doing, I have considered the entire record in an effort to perceive and understand the petitioners' ninth amendment claim, despite

the vague and general nature of their brief upon this point. I observe further in this regard the paucity of cases defining, enumerating, or interpreting ninth amendment rights. Mr. Justice Goldberg, speaking in a concurring opinion in *Griswold* v. *Connecticut*, 381 U.S. 479 (1964), cites but three Supreme Court cases treating of the ninth amendment during the entire period of the Court's existence, supplemented by two "see also" citations. 381 U.S. at 490-1.

Mr. Justice Stewart, while dissenting in *Griswold, supra,* pointed out that:

> "The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' *United States* v. *Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual states." 381 U.S. at 529-30.

I apply to the petitioners' ninth amendment[16] argument Mr. Justice Stewart's statement in *Griswold, supra,* at 529, "but to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."

The thrust of the tenth amendment argument attempts to place section 315 within the ambit of powers not delegated to the United States by the Constitution. The threshold weakness of this contention is that the Supreme Court has affirmatively held that the broadcasting system established by Title 47 U.S.C. is a proper exercise of the constitutional power of Congress over commerce, *National*

[16] For additional citations to discussions of the origin of, reasons for, and applicability of the ninth amendment, see *Griswold*, 381 U.S. 489, 490, 491, and footnotes thereon.

Broadcasting Co. v. *United States, supra,* and in enacting Title 47 U.S.C., Congress must be deemed to have exercised its power within constitutional limitations. *Sablowsky* v. *United States,* 101 F.2d 183 (3rd Cir. 1938). I have discussed in part V of this opinion the right of Congress, under established precedents, to delegate the administration of statutory provisions to agency determination. It follows, then, that Congress having acted herein under specifically identified constitutional power, approved by the Supreme Court, properly delegated execution of its statutory mandate to the Commission. Therefore, there exists in this case no transgression of any power reserved to the states or the people. "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments must fail." *United Public Workers* v. *Mitchell, supra,* at 96.

VIII. Does the Fairness Doctrine impair free speech in violation of the first amendment by imposing a prior restraint upon the expression of views, arguments, and opinions by petitioners, as well as by all other owners of radio stations, and upon those who pay for the use of such facilities?

Beginning with citations and irrefutable quotations relating to the purposes, the meaning, and the breadth and scope of the Bill of Rights, and especially of the first amendment, from *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Board of Education* v. *Barnett,* 319 U.S. 624 (1943); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Grosjean* v. *American Press,* 297 U.S. 233 (1936); *Near* v. *Minnesota ex rel Olson,* 283 U.S. 697 (1931); and *McIntire* v. *William Penn Broadcasting Co. of Philadelphia,* 151 F.2d 597 (3rd Cir. 1945), *cert. denied,* 327 U.S. 779 (1946), the petitioners contend that the Fairness Doctrine, measured against the principles of those cases,

imposes a direct and previous restraint upon the right of free speech guaranteed by the first amendment. This results, say petitioners, from the Doctrine's restraining a licensee from speaking out editorially on issues of public importance except on condition that he seek out and grant free time to another to express oppositorial views. Further restraint arises, they say, because an owner of a station "may not permit his facilities to be used by a paying citizen to speak out in opposition to governmental action or policy unless such owner makes available free time commensurate with the paid time to voice the contrary view." It follows, say petitioners, that the Fairness Doctrine creates "previous restraint [and the] fear of subsequent punishment" through danger or threat of the forfeiture of the licensee's license. Beyond this the petitioners further argue they are forced by the Doctrine to surrender "as a pre-condition to the obtaining of a radio station license," their right of freedom of speech and are, finally, compelled to assume the "unlawful obligation" of becoming the "first censor" of all public interest broadcasts at the risk of ultimate loss of their broadcasting license at renewal time if their censorship is not to the liking of the Commission.

I begin, then, with an examination of the reasons advanced by the respondents for the formation and operation of the Doctrine:

> "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [constitutional] rights." *Schneider* v. *State,* 308 U.S. 147, 161 (1939).

First, then, I set forth in the several following paragraphs the respondents' reasons, advanced in brief and oral argument, for the regulations constituting the Fairness Doctrine.

Radio broadcasters, state the respondents, by utilizing

the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, *id est,* the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. The first amendment establishes an informed electorate as the foundation stone of a democracy.

> "In presenting programs dealing with controversial issues of public importance, the fairness doctrine imposes upon licensees the affirmative obligation to afford reasonable opportunity for the expression of conflicting viewpoints. As such, it is reasonably related to the statutory scheme which provides that licenses are issued for limited times to persons who act not in their own private interest, but as 'trustees' for the public's interest in 'the larger and more effective use of radio,' 47 U.S.C. 303(g)."[17] Respondent's brief at 21.

The "public interest," continue the respondents, having been consistently sustained by the courts as a valid standard to guide the Commission in the exercise of its prescribed duties, has been made more precise by the incorporating into the Communications Act of 1934 of the fairness principle. A broadcast station, not being a common carrier, and having both the duty and the right of determining whether a controversial program is in the public interest, must, after having exercised that determination by broadcasting a particular program, in the public inter-

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[17] 47 U.S.C. § 303(g) (1962) reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

est afford equal opportunity for the broadcast of the other side of that controversial issue. This burden exists equally well when the initial broadcast consists of a personal attack upon a person or organization. The crucial consideration is the public interest in hearing both sides. The licensees' obligation to present both sides does not arise from the factual truth or falsity of the broadcast, because in the application of the Doctrine the ultimate determination of the merits of the issue will be made by the general public for whose information, presumably, the initial broadcast was originally made.

> "[The freedom of speech guaranteed by the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Association Press,* 52 F.Supp. 362, 372 (L.Hand, J.) (S.D.N.Y. 1945), *aff'd* 326 U.S. 1 (1945).

Against this backdrop and the entire record, I do not find in this case the existence of any "prior or previous restraint." Concise or even broad definitions of the factual situations or practices which constitute a prior restraint are non-existent within the wide scope of the Court's review of first and fourteenth amendment cases. Certainly, however, any type of Government censorship imposed prior to permitted publication is an abrogation of first amendment guarantees. *Joseph Burstyn, Inc.* v. *Wilson, supra; Schneider* v. *State, supra; Grosjean* v. *American Press Co., supra.* Similarly, a licensing program operating in fact as a censorship program constitutes a first amendment violation. *Burstyn, Inc.* v. *Wilson, supra.* Accepting readily the obvious fact that other situations could constitute a prior restraint, I confine my discussion to the facts in the present case. The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of pro-

gram material, program substance, program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product. They are not required to submit any broadcast material to the Commission, or any other Government agency, prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint. It seems almost superfluous for me to have to point out that section 326 specifically prohibits any censorship action on the part of the Commission.

Turning, then, to the licensing scheme incorporated in Title 47 U.S.C., I observe readily that no provision whatsoever requires the license applicant to waive, forego, or sacrifice the liberty to discuss, when licensed, publicly all matters of public concern. Consideration of public interest, convenience, and necessity are alone the prescribed existing and operational standards for eligibility for issuance of a broadcast license. Although petitioners allege that a fear of punishment may constitute a de facto restraint upon the exercise of their free speech guarantees through a denial of their ultimate renewal application, I point out—as I have done before in this opinion—that the remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from any illegal, arbitrary, or capricious conduct on the part of the Commission. Petitioners have full access to the ground rules governing the Fairness Doctrine, since they have been printed in the Federal Register, 29 Fed. Reg. 10416, and furnished to all broadcast licensees. Broadcasters have full opportunity to answer any complaint against their station, *Letter to Oren Harris, supra,* and may request a ruling from the Commission if they are in doubt whether a particular set of facts is within the Doctrine. *Cullman Broadcasting Co., supra.* Finally, I observe that the

Commission has recorded its position against the invocation of sanctions against any broadcaster for an honest mistake in judgment. *Report, supra,* at 1246 and *Capitol Broadcasting Co.,* 2 P & F Radio Reg. 2d 1104 (1964).

Weaving together the several threads of discussion presented in this section of this opinion, I conclude that there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens," *Grosjean* v. *American Public Press, supra,* at 249. Having found no violation de jure or de facto of petitioners' rights, I am absolved from further consideration, at least in this case, of the reasons advanced by the Commission for the existence of the doctrine (referring back, of course, to the doctrine of *Schneider, supra*).

Conclusions

1. 47 U.S.C. § 315 (1962) adopted the Commission's Fairness Doctrine, as set forth in the Commission's 1949 *Report, supra,* and in so doing, the Congress did not commit an unconstitutional delegation of its legislative function.

2. The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights.

3. Neither 47 U.S.C. § 315 (1962) nor the Fairness Doctrine is violative of the ninth or tenth amendments to the Constitution.

4. Under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution or is the Doctrine violative of either the ninth and tenth amendments.

The Commission action under review is

Affirmed

FAHY, *Circuit Judge:* I concur in the result reached by Judge Tamm and in general with his reasoning, without committing myself to all details of the opinion. For example, I have doubts that the fairness doctrine "recognizes and enforces the free speech right of the victim of any personel attack made during the broadcast." I agree with the Commission without finding it necessary to accede to this position.

Moreover, I agree with the Commission that a reply to a personal attack is not conditioned upon the ability of the licensee to obtain paid sponsorship for the reply. As to the procurement of sponsorship I need go no further than the case of a personal attack.

WILBUR K. MILLER, *Senior Circuit Judge,* did not participate in the consideration and decision of this case on the merits, set forth in the foregoing opinion.

[Filed June 13, 1967]

[Caption omitted]

On Petition to Review and Set Aside an Order of the Federal Communications Commission.

Before: Wilbur K. Miller, Senior Circuit Judge, and Fahy* and Tamm, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On November 22, 1966, the court filed opinions and a judgment dismissing the petition for review. On December 21, 1966, respondents filed a petition for rehearing en banc and petitioners filed an answer thereto. On March 13, 1967, the court entered an order vacating the opinions and judgment filed November 22, 1966, and ordered that the case shall remain with the assigned division of the court for a decision on the merits of the petition. On reconsideration of the entire record and the argument of counsel, it is

ORDERED and ADJUDGED by this court that the action of the Federal Communications Commission on review in this case is affirmed.

Per Circuit Judge Tamm

Dated: June 13, 1967

Separate opinion by Circuit Judge Fahy concurring in the result. Senior Circuit Judge Wilbur K. Miller did not participate in the consideration and decision of this case on the merits.

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* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

SUPREME COURT OF THE UNITED STATES

No. 600 ——, October Term, 1967

RED LION BROADCASTING CO., INC., ETC., ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

Order Allowing Certiorari

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

VOLUME I

JOINT APPENDIX IN COURT OF APPEALS

	Page
Summary of Proceedings Below	2a
Notice of Proposed Rule Making, released April 8, 1966	3a
Comments of International Typographical Union (AFL–CIO)	9a
Letter of WPSD–TV, Paducah, Kentucky	13a
Letter of Joseph H. Chislow	15a
Comments for File on Proposed Rulemaking in Docket No. 16574 (Joseph H. Chislow)	16a
Letter of the National Council of the Churches of Christ	21a
Comments of Laborers' International of North America	22a
Statement to the FCC on the Proposed Rule on Personal Attacks and Political Editorials from Hallock Hoffman, President of the Pacifica Foundation	24a
Comments of WIBC, Inc	33a
Comments of Storer Broadcasting Company	34a
Comments of the National Association of Broadcasters	36a
Comments of Mutual Broadcasting System, Inc	48a
Comments of Interstate Broadcasting Company	51a
Comments of Trigg-Vaughn Stations, Inc	60a
Comments of Meredith Broadcasting Company	61a
Comments of National Broadcasting Company, Inc	63a

333–016—69——1

	Page
Comments of Columbia Broadcasting Systems, Inc	72a
Comments of Carroll M. Barringer	81a
Comments of Cape Fear Telecasting, Inc	84a
Comments of Bedford Broadcasting Corp., *et al.* (including Radio Television News Directors Association)	87a
Comments in Opposition to Proposed Rulemaking (Griffin-Leake TV, Inc., *et al.*)	175a
Comments of Golden Empire Broadcasting Company	181a
Comments by Mission Broadcasting Company	182a
Joint Comments (Corinthian Television Corp., *et al.*)	186a
Letter of the American Civil Liberties Union	200a
Comment of the United Steelworkers of America, AFL–CIO	203a
Resolution by the Florida Association of Broadcasters, Inc	208a
Memorandum Opinion and Order Adopting Rules, released July 10, 1967	209a
Dissenting Statement of Commissioner Robert T. Bartley	222a
Concurring Opinion of Commissioner Lee Loevinger	222a
Memorandum Opinion and Order Amending Rules, released August 7, 1967	223a
Erratum to Memorandum, Opinion and Order, released August 9, 1967	227a
Memorandum Opinion and Order Revising Rules, released March 29, 1968	228a
Dissenting Statement of Commissioner Robert T. Bartley	235a
Dissenting Opinion of Commissioner Lee Loevinger	236a
Concurrent Statement of Commissioner Kenneth A. Cox	251a
Joint Petition to Review and Order of the Federal Communications Commission (Radio Television News Directors Association, *et al.*)	264a
Petition for Review of an Order of the Federal Communications Commission (Columbia Broadcasting System, Inc.)	270a
Supplement to Joint Petition to Review an Order of the Federal Communications Commission (Radio Television News Directors Association, *et al.*)	278a
Supplement to Petition for Review of an Order of the Federal Communications Commission (Columbia Broadcasting System Inc.)	280a
Petition for Review of an Order of the Federal Communications Commission (National Broadcasting Company, Inc.)	284a

PROCEEDINGS IN COURT OF APPEALS

Motion of Petitioner for Leave to File Exhibit (Columbia Broadcasting System, Inc.)	291a
Order granting Motion of Petitioner for Leave to File Exhibit	292a
Motion of Respondents to Hold Petitions for Review in Abeyance	293a
Answer of Petitioners to Motion to Hold Cases in Abeyance	295a
Order on Motion to Hold in Abeyance	297a
Motion for Extension of Time in Which to File Respondents' Brief	299a
Order Granting Motion for Extension of Time in Which to File Respondents' Brief	300a
Motion to Hold Cases in Abeyance and to Authorize Further Proceedings	301a
Response of Petitioner Columbia Broadcasting System, Inc. to Motion of Respondents to Hold Cases in Abeyance and to Authorize Further Proceedings	302a
Answer of Petitioners Radio Television News Directors Association, et al. to Motion to Hold Cases in Abeyance and to Authorize Further Proceedings	312a

Response of Petitioner, National Broadcasting Company, Inc., to Motion to Hold Cases in Abeyance and to Authorize Further Proceedings ..... Page 316a
Amendment to Answer of Radio Television News Directors Association et al. to Motion to Hold Cases in Abeyance and to Authorize Further Proceedings 323a
Reply of Respondents to Petitioners' Responses to Respondents' Motion to Hold Cases in Abeyance and to Authorize Further Proceedings 332a
Order Denying Motion to Hold Cases in Abeyance and to Authorize Further Proceedings 341a
Motion of Petitioner for Leave to File Supplemental Exhibit 342a
Order Granting Motion of Petitioner for Leave to File Supplemental Exhibit 343a
Opinion of Court of Appeals 344a
Judgment of Court of Appeals 374a
Motion of Respondents for Stay of Mandate 375a
Opposition of Petitioners Radio Television News Directors Association, et al. to Motion for Stay of Mandate 377a
Opposition of Petitioner National Broadcasting Company to Respondent's Motion for Stay of Mandate 379a
Order granting Motion of Respondents for Stay of Mandate 380b

VOLUME II

EXHIBITS TO BRIEFS OF COLUMBIA BROADCASTING SYSTEM, INC. IN COURT OF APPEALS

Exhibit to Brief 381a
Supplemental Exhibit to Reply Brief .....

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RELEVANT DOCKET ENTRIES

Radio Television News Directors Association, et al. v. *Federal Communications Commission,* No. 16369

7–27–67	Docketed cause
7–27–67	Filed original and 4 copies joint petition to review an order of the F.C.C., service
8– 8–67	Filed original and 4 copies supplement to joint petition to review an order of F.C.C., service
9– 5–67	Filed original and 4 copies motion to accept certified index to record
9– 7–67	Entered order granting motion of September 5, 1967
9– 8–67	Filed index to record per order of 9–7–67
10– 2–67	Filed original and 4 copies joint motion for approval of stipulation as to procedural schedule, affidavit and service
10– 2–67	Entered order granting procedural schedule for filing of briefs and appendix
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

National Broadcasting Company, Inc. v. *United States of America and Federal Communications Commission,* No. 16498

10–14–67	Docketed cause (Transfer from Second Circuit)
10–14–67	Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

Columbia Broadcasting System, Inc. v. *United States of America and Federal Communications Commission*, No. 16499

10–14–67	Docketed cause (Transfer from Second Circuit)
10–14–67	Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

The following entries appear with substantial uniformity in the docket sheets for each of Nos. 16369, 16498 and 16499:

10–24–67	Entered order that cases be consolidated for briefing and argument, etc.
11–21–67	Filed original and 4 copies motion of petitioner for leave to file a separately bound exhibit with brief, service
11–21–67	Entered order granting leave to file separately bound printed exhibit with brief
11–21–67	Filed 30 copies brief for petitioner (National Broadcasting Co.), service
11–21–67	Filed 30 copies printed copies exhibit to brief for petitioner
11–21–67	Filed 30 copies petitioner brief, service
11–21–67	Filed original and 4 copies petition of King Broadcasting Co. for leave to file brief as amicus curiae, service
12– 5–67	Filed 30 copies of amicus curiae brief
12– 6–67	Entered order granting motion of November 21, 1967
12–14–67	Filed original and 4 copies motion to extend time to file respondent brief to January 22, 1968, affidavit and service
12–18–67	Entered order granting motion of December 14, 1967
12–18–67	Filed original and 4 copies motion of respondent to hold petition for review in abeyance
12–18–67	Filed original and 4 copies motion of respondent to correct motion for extending time to file brief, affidavit and service

12–29–67	Filed original and 4 copies answer to motion to hold cases in abeyance
1– 2–68	Entered order granting motion of December 18, 1967, etc.
1– 3–68	Filed motion for certificate of record, affidavit and service
1– 3–68	Entered order granting motion of January 3, 1968
1– 4–68	Filed original and 4 copies designation of record for use in Supreme Court in connection with petition for certiorari, service
1– 4–68	Filed copy of record of F.C.C. and transmitted to Supreme Court in connection with petition for certiorari (per order)
1– 4–68	Entered order granting motion of January 4, 1968
1–12–68	Filed notice of docketing in Supreme Court as No. 993
1–30–68	Filed original and 4 copies motion to transfer transcript of record to F.C.C., service
2– 5–68	Filed certified copy order of Supreme Court denying certiorari
2– 8–68	Entered order granting motion of January 30, 1968
2– 8–68	Filed 30 copies of petitioner brief, corrected, and service
2– 9–68	Forwarded record to F.C.C. per order of February 8, 1968
2–23–68	Filed original and 4 copies of F.T.A.S. motion to file a brief and participate in oral argument as amicus curiae, affidavit and service
2–27–68	Filed original and 4 copies motion to extend time to file respondent brief to March 4, 1968, affidavit and service
2–27–68	Entered order granting extension of time to file respondent brief to March 4, 1968
2–27–68	Entered order granting leave to National Academy of Television Arts and Sciences to file brief as amicus curiae, etc.
2–28–68	Filed original and 4 copies of motion for leave to file an amici curiae brief and appearance for the United Church of Christ, affidavit and service
2–29–68	Filed 30 copies of Comm. of United Church of Christ, et al. brief amicus curiae
2–29–68	Entered order granting motions of February 28, 1968

3– 4–68 Filed original and 4 copies of motion of respondent to hold cases in abeyance and to authorize further proceedings, service

3–13–68 Filed original and 4 copies response to motion to hold cases in abeyance and to authorize further proceedings, affidavit and service (N.B.C.)

3–14–68 Filed original and 4 copies response to motion of respondent to hold cases in abeyance and to authorize further proceedings, affidavit and service (C.B.S.)

3–14–68 Filed original and 4 copies answer of petitioner to motion to hold cases in abeyance (Radio Television News Directors Association, et al.)

3–22–68 Entered order denying motion of March 4, 1968 and that Government brief be filed on April 1, 1968 and petitioner brief within fifteen days thereafter, etc.

3–22–68 Filed original and 4 copies of respondent reply to petitioner response to hold cases in abeyance, etc., affidavit and service

3–22–68 Filed original and 4 copies amendment to answer of R.T.N.D.A. to motion to hold cases in abeyance, etc., affidavit and service

4– 1–68 Filed original and 4 copies motion for enlargement of time to argue orally and to permit separate counsel to argue for petitioners in each case, affidavit and service

4– 1–68 Filed 30 copies of respondent brief

4– 2–68 Entered order granting motion of April 1, 1968 (oral argument set for 1½ hours for each side)

4–4–68 Filed original and 3 copies of respondent motion for acceptance of supplemental index to official record, affidavit and service

4– 8–68 Entered order granting motion to file certified copy of supplemental index

4– 8–68 Filed certified copy of supplemental index

4–12–68 Filed 30 copies of amicus curiae brief (N.A.A.S.)

4–15–68 Entered order granting extension of time to file reply brief for N.B.C. to April 19, 1968

4–15–68 Filed original and 4 copies of motion to extend time to file reply brief of N.B.C. to April 19, 1968, affidavit and service

4–16–68	Filed 30 copies of Columbia reply brief
4–16–68	Filed 30 copies of R.T.V.N.D. reply brief
4–16–68	Filed original and 4 copies motion of petitioner for leave to file supplemental exhibit, affidavit and service (16498 only)
4–17–68	Entered order granting motion of April 16, 1968 (C.B.S. supplemental exhibit)
4–18–68	Filed 30 copies of reply brief for N.B.C., service
4–17–68	Filed 30 copies of supplemental exhibit to reply brief for C.B.S.
4–19–68	Filed 30 copies of joint appendix, service (16369, 16498–99)
5–14–68	Filed original and 4 copies motion of amici curiae to present oral argument, affidavit and service
5–14–68	Filed original and 4 copies opposition to motion for leave to present oral argument, affidavit and service
5–15–68	Entered order denying motion of amici curiae
5–17–68	Heard and taken under advisement (16369, 16498, 16499)
9–10–68	Entered judgment that the FCC order adopting the personal attach and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day
9–10–68	Entered opinion by Judge Swygert
9–30–68	Filed original & 3 copies motion of respondent to stay mandate, affidavit & service (16369–16498)
10– 3–68	Filed original & 4 copies of petitioner's answer to motion of respondent to stay mandate, affidavit & service (16369–498)
10 7–68	Filed original & 3 copies of opposition to motion for stay of mandate, affidavit & service (16369–498)
10–11–68	Entered order granting motion of 9–30–68 per rule 41(b) (16369–16498)
11–12–68	Filed notice of docketing in Supreme Court as No. 71[7] (16369–498)
1–17–69	Filed order of Supreme Court granting certiorari entered 1–13–69

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 16,369, 16,498 and 16,499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petitions to Review an Order of the Federal Communications Commission

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JOINT APPENDIX

Summary of Proceedings Below

1. F.C.C. Notice of Proposed Rule Making, adopted April 6, 1966, released April 8, 1966.

2. F.C.C. Order extending time for filing comments from May 16, 1966, to June 20, 1966, and for filing reply comments from May 31, 1966 to July 5, 1966, released May 4, 1966.

3. F.C.C. Memorandum Opinion and Order adopting Rules, adopted July 5, 1967, released July 10, 1967.

4. F.C.C. Memorandum Opinion and Order amending Rules, adopted August 2, 1967, released August 7, 1967.

5. F.C.C. ERRATUM to its Memorandum Opinion and Order of August 7, 1967, released August 9, 1967.

6. F.C.C. Memorandum Opinion and Order revising Rules, adopted March 27, 1968, released March 29, 1968.

Notice of Proposed Rule Making

1 Before the

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 16574

In the Matter of

Amendment of Part 73 of the Rules to provide procedures in the event of a personal attack or where a station editorializes as to political candidates

Notice of Proposed Rule Making

By the Commission: Commissioner Hyde abstaining from voting; Commissioner Bartley dissenting to the issuance of a proposal that a rule be adopted in this area; Commissioner Loevinger absent.

1. Notice of Proposed Rule Making is hereby given in the above-entitled matter.

2. The "fairness doctrine" provides that if broadcast licensees permit their facilities to be used for the discussion of a controversial issue of public importance, they must afford a reasonable opportunity for the presentation of conflicting views. The basic enunciation of this doctrine is contained in the Commission's 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246. Subsequently, the doctrine was recognized by Congress in the 1959 amendments to Section 315 of the Communications Act (Public Law 86-274). In the Editorializing Report, the Commission stated that ". . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station." (p. 1258). This statement embodies a part of the fairness doctrine known as the "personal attack" principle, which is applicable "where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character or honesty or

like personal qualities." Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, page 17.

3. In its rulings the Commission has set forth the obligation of a station licensee when a personal attack occurs over his facilities, i.e., the licensee must send a transcript or summary of the attack to the individual or group attacked, together with an offer of time for an adequate response. See *Clayton W. Mapoles,* 23 Pike and Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike and Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike and Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4 Pike and Fischer, R.R. 2d 681, 685 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 25, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra.* Despite such notification and the Commission's rulings, the procedures specified have not always been followed even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now propose to codify the procedures which licensees are required to follow in personal attack situations. Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this imporant area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed.

4. We have used the phrase, "in appropriate circumstances", because we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts

and the applicable Commission rulings and interpretations.[1] We emphasize that it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. The rules are directed to situations where the licensees did not comply with the requirement of the personal attack doctrine as to notification and offer of time to respond, even though there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist).

5. As indicated, the proposed rule, with minor changes, codifies existing procedures in personal attack situations. Paragraph (a) places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee would be required to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack.[2] The one-week
3 outer time limit thus does not mean that such a copy should not be sent earlier or, indeed, before the attack occurs, particularly where time is of the essence. Along with the copy, the licensee would be required to send the attacked person or group a notice stating when the attack occurred and containing an offer of a reasonable opportunity to respond. This is all that would be required by the rule. Other matters would be left to the reasonable judgment of the licensee and to good faith negotiations. For example, the licensee could impose a reasonable time limit in which the person notified would be required to re-

[1] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

[2] Where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

spond. The licensee might make inquiries concerning willingness to pay along the lines described in our recent ruling in *Red Lion Broadcasting Co., Inc.*, 1 FCC 2d 1587, part. 1 (1965). The rule again is not designed to cover any of these other facets. Guidance in these respects would be available in the Commission's interpretative rulings, and any controversies would be considered by the Commission in the context of specific factual situations.

6. We have excluded from the proposed rule personal attacks on foreign groups or foreign public figures. Excluded also are situations where personal attacks are made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks on foreign leaders follows present policy. Note, page 18, Fairness Primer, *supra*. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack doctrine—is generally applicable to this situation. Finally, the fairness doctrine may, of course, be applicable to particular factual situations in the political broadcast field. The necessity for notice and other procedures in the event of a personal attack may be different in this field. We shall continue our present practice of interpretative rulings given in specific cases in the political broadcast area. With further experience, we may be in a position to delineate more precisely licensee responsibility in this area.

7. We also propose a rule to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates. Such political editorials are increasing,[3] with some indication of failure to comply with the corresponding obligation to observe the *Times-Mirror* requirement. The rule would require that the appro-

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[3] In 1960, 53 Standard broadcasting and 2 television stations carried political editorials during the general elections. Their number had increased to 103 standard broadcasting and 13 television stations by 1964.

priate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be offered reasonable opportunity to respond. We have used the phrase "reasonable opportunity" here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. See *Final Report of the Senate Committee on Commerce,* Sen. Report 994, Part 6, 87th Cong., 2d Sess., p. 7. We also propose that the notification time in this respect be within 24 hours of the editorial; time is much more of the essence in this field, and there would appear to be no reason why the licensee could not readily inform the candidate of the editorial. Indeed, the licensee might again make the notification required before the broadcast of the editorial; such prior notification and opportunity for response would be required in the case of a political editorial broadcast close to the election. As in the case of the personal attack proposal, the rule does not purport to deal with all facets of the *Times-Mirror* ruling. The licensee could impose reasonable limitations, such as the appearance of a spokesman for the candidate, in order to avoid any Section 315 "equal opportunities" cycle; the matter of time of scheduling would also be left to reasonable judgment and negotiation. Finally, the rule is directed only to station editorials endorsing, or opposing, political candidates. The applicability of *Times-Mirror* to other situations would be left to rulings in particular factual settings.[4]

8. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules, interested parties may

[4] Thus, *Times-Mirror* itself did not involve a station editorial. The *Times-Mirror* situation, since it did involve personal attacks, would come within paragraph (a) of the proposed rule.

file comments herein on or before May 16, 1966, with reply comments due on or before May 31, 1966. In reaching its decision herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

5 9. Authority for adoption of the rules proposed herein is found in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

10. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all written copies shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

(SEAL) BEN F. WAPLE
Secretary

Attachment
Adopted: April 6, 1966
Released: April 8, 1966

6 APPENDIX

Section 73.123 is added to read as follows:

§ 73.123 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a) Applicability of the Fairness Doctrine, 29 F.R. 10415.

(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

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13 **Comments of International Typographical Union (AFL-CIO)**

1. These comments are filed on behalf of International Typographical Union (AFL-CIO), a labor organization headquartered in Colorado Springs, Colorado with a current membership of over 100,000. The International Typographical Union was established in 1852 and is the oldest labor organization in the United States.

2. The International Typographical Union is particularly interested in the fairness doctrine because of the use of the public airwaves in connection with labor disputes and the fair treatment of public issues generally by broadcasters is an essential element of the rights of the citizen in a democ-

racy. The International Typographical Union long ago adopted a fairness doctrine for its own elections whereby candidates for international office receive free space in *The Typographical Journal,* giving each candidate an equal opportunity to make his views known to the members. Therefore, when we endorse, as we do, the Commission's fairness doctrine, we know whereof we speak. Democracy is promoted by giving candidates an equal oportunity to disseminate their views in public elections as well as in union elections.

3. We therefore endorse and urge adoption of the proposed rule codifying the fairness doctrine. We envision that broadcasters will complain that this rule deprives them of their rights under the First and Fifth Amendments, but they forget all too easily that a broadcast license is not a property right and that they hold these licenses in trust for the public and not primarily for their own financial welfare.

14 Nor is there a First Amendment right to use the public airwaves to foreclose opposing views from obtaining equal public audience.

4. We urge that the proposed rule should be expanded to embody also the statutory policy requiring broadcasters to open their facilities to public groups to state their views on issues of importance. Promulgation of such a provision simultaneously with or as a part of the proposed rule is necessary lest the rule have the undesired effect of discouraging broadcasters from discussion of public issues.

5. Such an amendment to the proposed rule would be consonant with what Congress itself did in amending § 315 in 1959. At the same time that Congress reaffirmed the equal time doctrine, Congress said:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from

the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

This provision was inserted lest the requirement for equal time be read to discourage the broadcasting of discussion of public issues. The same reason militates in favor of a similar provision in the Commission's rule. Indeed, we think that the language the Congress itself has chosen would be appropriate for the rule.

6. We are particularly concerned with this issue because of the difficulties which we and other unions have experienced in publicizing our position in labor disputes. Many broadcasters also own newspapers and for that reason, or perhaps because they are themselves employers, generally favor the employer's position against that of the union in any labor dispute. Moreover, in many communities, particularly in the South, the major media of communication fail to provide the public with the union's side of the issue. They fail to do so either due to their own views or because they fear reprisals from advertisers. When a newspaper is one-sided, its failure to fulfill its responsibilities to the public is protected by the Constitution; nor would we have it otherwise. However, the public airwaves are a material resource which in a democracy can have no more important use than to promote the exchange of views on matters of public importance. The failure of other media of mass communication to deal adequately with labor disputes serves rather to increase than to decrease the obligations of broadcasters lest the public remain ignorant, or what is perhaps worse, hear only one side of the story.

7. A current situation in Lafayette, Louisiana is illustrative of this problem. Since December 1964 there has been a strike by Lafayette Typographical Union No. 832, one of

the affiliates of the International Typographical Union, against the publisher of the Lafayette Advertiser, a daily newspaper which is the only newspaper in the Lafayette area. There has been a refusal of this company to recognize the union, a refusal which is presently the subject of a complaint against the company issued by the General Counsel of the National Labor Relations Board. The issue is obviously one of great public importance and interest in the community and for obvious reasons the struck newspaper is not available to the union as a medium for the expression of its views. Accordingly, the union has made strenuous efforts to obtain air time on the local broadcasting stations. It offered to submit the script for its proposed program for review by the station. In every instance the union was denied the opportunity to purchase the time. The dereliction of the broadcasters in Lafayette is noteworthy in this rule-making proceeding because it is symptomatic of a prevalent practice contrary to the public interest as defined by Congress. Local counsel has written this Commission with specific reference to that case and we trust that these broadcasters will soon be disabused of their excessively narrow view of their duty. However, other broadcasters doubtless share their misconception and the proposed rule's emphasis on equality may mislead others into believing that a neutral silence respecting controversial issues is the extent of their duty. The Lafayette situation of total blackout of the union's views in a labor dispute has recently been duplicated in Sioux Falls, South Dakota and Pensacola, Florida.

8. We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

16 2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ GERHARD P. VAN ARKEL
Gerhard P. Van Arkel

/s/ GEORGE KAUFMANN
George Kaufmann

1730 K Street, N.W.
Washington, D. C., 20006
Attorneys for International Typographical Union (AFL-CIO)

VAN ARKEL & KAISER
Of Counsel

May, 1966

17

WPSD-TV
P. O. Box 1037
PADUCAH, KENTUCKY 42001

May 9, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

This letter is in response to the Commission's Public Notice B, Report No. 5947, dated April 8, 1966, in which the commission invited comments on its proposal to incorporate the "fairness doctrine" in its broadcast rules.

The incorporation of this new rule might well bring about a result quite different from that intended.

The apparent purpose of the new rule is a good one: to insure that broadcasters treat both sides of a controversial issue or campaign fairly.

However the proposed rule includes some broad language which, in its untried state, could prove quite uncertain to a conscientious broadcaster.

For instance, the proposed rule would provide that when "an attack is made upon the . . . character . . . of a group," the licensee shall furnish a script, tape or summary to the group and offer an opportunity to respond.

A broadcaster who has encouraged lively discussion of important public issues can easily imagine the following:

A Republican saying that Democrats are war-mongers (or a Democrat saying that Republicans are war-mongers).

A John Birch society member saying that pacifists are spineless.

A liberal saying that conservatives are selfish.

A conservative saying that liberals are reckless.

18 The broadcaster must then decide whether a charge that someone or some group is reckless, selfish, spineless or a war-monger is "an attack upon the character or like personal quality" of that person or group.

And if he decides that there was such an attack, he must determine who among the liberals, conservatives, pacifists or party members should receive the tape and an offer of time to respond.

We realize that the broadcaster has the obligation to inform aggrieved persons of an attack, and to offer the use of his facilities for a response. But this obligation is already implicit in the Fairness Doctrine, and no further action is necessary to satisfy it.

Under the broad language of an untested new rule, however, the broadcaster may see himself confronted with a mammoth task of providing tapes or scripts to far-flung people with little assurance that he is even then satisfying the rule.

It is not likely to encourage the presentation of spirited public debate on volatile issues. And it will not provide any new rights to persons or groups who might be attacked.

We therefore respectfully recommend that proper handling of controversial issues and campaigns be left to fair-minded broadcasters and commissioners without complex new rules.

Sincerely,

/s/ FRED PAXTON
Fred Paxton
Managing Director

FP/cc

19

Peace Valley Road
Towaco, New Jersey
May 11, 1966

Federal Communications Commission
Washington, D. C. 20554
Attention: Mr. Ben F. Waple,
Secretary

Gentlemen:

Attached is an original and 14 copies of comments filed in the matter of proposed Commission rulemaking in Docket 16574. While my general response is favourable to the proposed rule changes, I respectfully offer suggestions aimed at making the significance of Commission effort more meaningful.

Should the Commission find that further comment in the matter of instant concern would be useful, I should

appreciate the opportunity to place myself at your disposal for this purpose.

Very truly yours,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Comments Docket 16574

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20 **Comments for File on Proposed Rulemaking in Docket No. 16574**

Pursuant to solicitation by the Commission for comment by interested persons in the matter of proposed rulemaking in the above listed Docket, comment thereon is herewith respectfully filed.

No exception is taken in respect to Commission intent to regulate abuses in the application of the "fairness doctrine" by broadcast station licensees. Rather, flagrant broadcaster disregard for the elementary principles of fairplay have become so frequent in recent years, as almost to argue that militance to protect free speech from becoming license, is long overdue. This is not a criticism of the Commission, it is instead an expression of admiration for the patient and long-suffering tolerance of the FCC toward the mounting disregard by broadcasters for the principles enunciated by the Congress as stated in the Conference Report on the 1959 Amendment to Section 315 (a) to wit:

> "Nothing in this sentence shall be construed as relieving broadcasters—from the obligation imposed on them under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Comments of Joseph H. Chislow

The undersigned wishes to congratulate the Commission for their proposal to codify the serial behavior required of broadcasters who use their public interest, station-licensed facilities to air personal attacks on individuals or groups.

To the extent that the proposed rulemaking seeks to establish criteria, calling for positive implementation of the "fairness doctrine", no other expression but full concurrence is intended. However the language of § 73.123 (a) neglects aspects of application to which the body of the instant rulemaking proposals alludes.

21 The Commission has defined the personal attack principle as applying to the besmirchment of the "honesty, character, integrity or like personal quality of an identified person or group." Yet a fundamental technique of the personal attack art is to quote incontextually from comments elicited from persons or groups on subjects not necessarily related to the subject at broadcast issue and by film-clip or tape-editing, to present those comments as the instant and, implicitly, the total attitude of persons or groups to controversial issues of public importance. Editorializing can be made to appear as solely the derisive appearance on the face of a program editorialist. Admittedly, it is difficult to restrain the facial contortions of commentators on issues of public importance. A large part of their function is to "act" before the televiewing audience and, if their sole inflammatory contributions to the viewing public were attributable to facial mobility, little harm to public opinion would be likely.

But, when the incontextual quotation ploy is verbally exploited, through what can only be regarded as the primary opinion forming medium in the United States, serious personal attacks is deliberately possible and often occurs.

A typical case of this precise sort is readily available to illustrate the practice. On June 10, 1964, a national TV

network carried a widely viewed, sponsored, one hour, network documentary on prime time, entitled "Murder and the Right to Bear Arms."

A purportedly reportorial, rather than editorial presentation, it nonetheless featured a highly covered bias favouring the views of proponents of stringent firearms regulation. The design of the program was so deliberate as to discredit the case for the opponents of stringency in this matter. Further, it served as a blatant pedestal for developing public fervour for the passage of the "Dodd (firearms registration and control) Bill" at a time when our citizenry was justifiably incensed over the assassination of our President.

To accomplish this objective, it sought to ridicule the officers and membership of the National Rifle Association of America. Through the device of the incontextual film-clip the broadcasters were able to pit "expert" rebuttal against the pre-collected, pre-canned expression of the incontextual and unresponsive views of the NRA, to controversial issues of public importance. Of course, since the program was billed as reportorial, no access for personal attack response was ever provided by the network.

22 In direct consequence of this propaganda technique, more reminiscent of Nazi Germany and Communist extremism, than hopefully of our own United States, opinion generation has led to impactive hysteria, receptive to a rash of stringent anti-gun laws, either now on the books, or well on the way to that end, in communities and states across the nation.

The example cited is offered because it is believed to be a familiar manifestation of an abuse with which the Commission must come to grips, if the blessing of freedom of expression is not to become a monster engine, ordering its own destruction.

In expressing sympathy for the problem which he Commission faces, it is appreciated that no mechanical formula within a fairness doctrine will always work, if scheming evasion is deliberately planned. The dilemma of what to do when seeking to encourage freedom of expression without encouraging license, cannot easily be solved when one deals with intangibles of right or wrong, of fairness or unfairness, of reasonable opportunity for unprejudiced argument on all sides of a public issue, as opposed to a tolerated capability for unreasonable, rigid, capricious suppression or distortion of an opponent view to the benefit of the proponent position.

The Commission is uniquely qualified and indeed, uniquely obliged, to give leadership to the resolution of a code of broadcaster ethics. In proposing authority now to deal with that codification, the Commission is properly exercising the will of the Congress. To implement that will along the lines herein designated, calls for no more than a minor clarification to the language of your proposed rulemaking. That modification is herewith respectfully offered in the hope that it will stimulate your expression, if not in the precise words suggested, at least toward the objectives sought.

The need, not provided for in your proposed rulemaking to enunciate "reasonable time" in terms which will not make ridiculous a formula 7-day response to an issue to be publicly decided on the day following the airing of a broadcast editorial, is obvious. Equally obvious, it is trusted, is the need to provide for network responsibility for a network-incurred personal attack obligation, as the logical alternative to individual station response to conceivably in excess of a hundred network station licensees, which distribute, but do not initiate a personal attack. Clearly, the privilege of response to each station's
23 individual responsibility under § 73.123(a) could be more burdensome than the attack. In defining the

mutual responsibilities of member stations in a network, Commission codification in this matter would be made meaningful.

Respectfully submitted,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Appendix 73.123 as modified

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24 APPENDIX

73.123—(a) When, during the—an identified person or group, (or that person or group is held to ridicule by opponent presentations inflammatory to the public view of the person or group, or when incontextual quotations attributable to that person or group are unfavorably presented as the specific attitude or response of that person or group to a public issue), the Licensee shall—

b(1) Reasonable time shall be understood to be governed by the timeliness of public response to a controversial issue of public importance. Where public opinion may be expected to be influenced in matters affecting legislation, or to exert influence on legislation, editorial attacks calling for the serial performance of (i), (ii) and (iii) by the broadcaster, shall not occur unless there is sufficient reasonable time for the person or group attacked to take timely access to the station licensee's facilities for considered response.

b(2) It shall be further understood that where a personal attack or political editorial adverse to a person or group is carried by affiliates of a network, the obligation for conformity with paragraph (b) shall rest with each station licensee involved and shall call for compliance with the

Letter of the National Council of the Churches of Christ

provisions of its requirements, by providing adversary access to the same network facilities as were employed in the initiating personal attack or political editorial.

(c) Formerly (b) unchanged.

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25 NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

475 RIVERSIDE DRIVE, NEW YORK, N.Y. 10027

May 16, 1966

The Chairman
Federal Communications Commission
Pennsylvania Avenue at 12th Street
Washington, D. C.

Dear Mr. Chairman:

With regard to Report No. 5947, dated April 8, 1966, a proposal of the Commission to amend broadcast rules in matter of personal attacks and political editoralizing, the Broadcasting and Film Commission of the National Council of the Churches of Christ in the U.S.A. has considered this matter and has taken action in support of the Commission's proposal.

We believe that this portion of the so-called Fairness Doctrine has been in fact a guiding principle for rulings of the Commission for some time. Further, we believe the provision requiring licensees to notify any person or group whose character, integrity, or like personal qualities is attacked on their station is entirely consistent with the public interest. Finally, we believe that requiring a licensee to offer a reasonable opportunity to persons attacked to respond over his facilities places proper responsibility upon the licensee and does not cause him undue hardship.

Comments of Laborers' International Union

For these reasons we encourage the Commission to incorporate these elements of the Fairness Doctrine into its broadcasting rules.

Sincerely,

/s/ WILLIAM F. FORE
William F. Fore

WFF:CP

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26 **Comments of Laborers' International of North America**

These comments are filed on behalf of Laborers' International Union of North America (AFL-CIO), a labor organization headquartered in Washington, D.C., with a current membership of approximately half a million. This International Union was established in 1903 and is the sixth largest in the AFL-CIO, and is the largest per capita paying affiliate of the Building Construction Trades Department.

This labor organization is especially interested in the fairness doctrine because of the ever increasing use of the public air waves in connection with organizational campaigns and the presentation of labor-management matters, to the public. The concept of the citizens' "right to know" all sides of issues is part and parcel of the fairness doctrine and an essential ingredient in a democratic society.

In the course of our organizational activities, particularly in the South, we have come to know first-hand what one-sided communication media can be. It is a well known fact that the organized business community has accesses to local "civic" organizations, local newspapers, local Chamber of Commerce, and law enforcement groups, etc. The National

Labor Relations Board has examined and set aside representation elections where these "local" forces operated to deny employees the right to freely exercise their choice in representation elections in industries affecting commerce. In a recent decision the NLRB set forth the rule that prior to a representation election all interested parties are entitled to the list of employees' names and addresses so that an equal opportunity can be given to the union to urge the employees and respond to the employers' and communities' propaganda as well as to tell its own story. Thus, efforts are being made to equalize the communication channels which presently favor the entrenched establishments, and we submit that the Commission's
27 fairness doctrine would constitute an important step in the direction of assuring that one of the major media of communication is kept open to provide the public with the union's side of the issue.

It is unquestioned that a broadcast license is clothed with the "public interest" and is granted in trust not for the licensee's personal profit or to serve a divided interest, but rather, as the Congress itself stated in amending Section 315 in 1959, "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries,

and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ ROBERT J. CONNERTON
Robert J. Connerton
General Counsel
Laborers' International Union
of North America, AFL-CIO
905 Sixteenth Street, N.W.
Washington, D. C. 20006

May 1966

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29 **Statement to the FCC on the Proposed Rule on Personal Attacks and Political Editorials From Hallock Hoffman, President of the Pacifica Foundation**

June 15, 1966

To: The Federal Communications Commission

The Pacifica Foundation, as owner and operator of three non-commercial radio stations, is grateful for the opportunity to comment on the proposed rule, under the existing "fairness doctrine," in respect to the obligations of licensees of the Federal Communications Commission in cases of attack on persons and in cases of the endorsement or opposition to the candidacy of a legally qualified candidate for public office.

THE PACIFICA FOUNDATION SUPPORTS THE FAIRNESS DOCTRINE

On its face the fairness doctrine is reasonable. No one argues against fairness, and therefore every broadcaster

ought to support the fairness doctrine if it actually achieves fairness. Arguments against the doctrine might once have been based on some notion of illegality or unconstitutionality of the doctrine, as exceeding the powers of the FCC or the government; or as improperly invading the rights of licensees. This line of argument is now dead. The constitutional status of the FCC and the government in respect to regulation of broadcasting has been firmly established. The differences between broadcasting and other forms of public affairs communications, like newspapers, are generally admitted—despite ritualistic outcries from time to time by leaders of the broadcasting "industry"—and most sensible people recognize that broadcasting must be regulated even to exist. Further, it is becoming clear from a line of cases before the Supreme Court, under the general theme of "state action," that broadcasters may be regarded as exercising governmental power through grant of licenses, and have therefore some of the obligations of government to treat those who seek their services without improper discrimination.

Broadcasters as federal licensees are franchised to use a communication medium that has to be under public control; the FCC, as agent of the government charged with allocating the right to use the limited frequencies to some and not to others, must regulate the licensees in the general interest of the public. No argument against the fairness doctrine can be made on the basis of legal or constitutional principle. Any argument against the doctrine, and especially against the proposed rules in respect to personal attacks or political editorials, must therefore be on practical grounds. It is Pacifica's belief that the burdens imposed by the proposed rules are not too heavy, that the purpose served by the rules is worth the cost in administration, attention and air time, and that the rules should be adopted.

THE FAIRNESS DOCTRINE IS PRACTICABLE

I do not mean to discount the cost of conducting a broadcasting station under these rules. The Pacifica stations are not typical, since our costs do not include those of the commercial broadcasters who must give away air time they might otherwise sell to comply with the rule. Our
31 costs, however, are severe. We are small; we have to raise as donations every dollar we spend; we have to skimp merely to survive; and we have to operate with short and often overworked staffs. Our interests are broad, and we devote a large share of our broadcast time to "public affairs" programs, as contrasted to the records and wire-service newscasts that make up the bulk of the broadcast day for many smaller commercial stations. As a result, our exposure to the operation of the fairness doctrine and the proposed rules is greater than that of the average radio station, and we spend a good deal of our limited resources trying to increase that exposure. The idea of Pacifica is the idea of free and open discussion, which leads inevitably to comments and views that seem to be "personal attacks" by those they refer to. The idea of Pacifica is the idea of freedom, and the idea of freedom encourages program participants to say what they might not say on other stations. It is our policy to inquire into the dark corners of our society, where the sacred cows are stabled. This policy often raises controversy and causes conflict. Pacifica is, therefore, well aware of the practical difficulties associated with the proposed rules. We know what we are getting into—we have tried to conduct our affairs in accord with the principles served by these rules in the past. We support the proposed rules from experience, as practicable, right and reasonable.

PACIFICA OPPOSES THE EXCLUSION OF FOREIGN GROUPS AND LEADERS FROM THE FAIRNESS DOCTRINE

We do object to the exclusion in section (b) of the proposed rule, which relieves the broadcaster of obligation

toward "foreign groups or foreign public figures . . ." I understand the reason for the exclusion: it may usually be difficult and sometimes impossible to find a spokesman for such groups and figures, to reply to charges made against them. The effect of the exclusion, however, is to license the cold war and the flaunting of national prejudice, and to encourage the lying and distortion that goes with them.

I believe our Republic would be better served by a modification of the obligations of section (a), rather than voiding those obligations. It might be possible, for example, to require that, as to foreign groups and foreign public figures, broadcasters make available air time for rebuttal or reply to (but not seek out) representatives of parties or groups in this country who defend the foreign groups or figures. The citizens of this country would have been spared a lot of nonsense and perhaps even a number of dangerous misconceptions if broadcasters had been obliged to make speakers on their stations answerable for their attacks on foreign governments and leaders.

The Rule for Editorials Is Sound

Since Pacifica is a non-profit educational foundation, we do not endorse or oppose candidates for public office, and it is against our policy to editorialize on any topic. We support section (c) of the proposed rule, however, as the only reasonable way to assure fairness when radio stations do broadcast political editorials in their own behalf.

Comments on the General Application of the Fairness Doctrine

I now presume upon this opportunity to make an additional comment on the fairness doctrine in its general application beyond cases of personal attack and political editorials.

The problem with the fairness doctrine in the past, in my judgment, has been that it was not enforced. The pro-

posed rules clarify the positive obligation of broadcasters to seek out those who have a claim to the right to rebut broadcast statements. The new rule will also fall heavily on the conscientious (as has the doctrine in the past) and lightly on those who take lightly their obligations as licensees unless it is enforced. One problem with enforcement is that the sanctions available to the FCC have been too limited. Refusing to renew a license or to give a full-term license to a broadcaster for violations of the fairness doctrine is too harsh a penalty for the violation; as one result, there is little conviction in the industry that the FCC will impose any penalty at all on those who flout the doctrine.

This situation could be improved if the FCC adopted a broader and less punitive range of sanctions. Since the problem of policing violations is one of the most difficult in trying to achieve equal application of the fairness doctrine to all licensees, such sanctions might have to depend on the interest and action of those offended. The FCC staff might be reserved for settling cases that could not be settled by the parties. For example, the FCC might adopt a rule requiring that a broadcaster who had violated the fairness doctrine must produce and broadcast a
34 program of merit equal to the offending program, satisfying the cause of the person or group offended. This program would have to be recorded, and the recording made available to the offended party for such other use as it wished. If the offended party did not agree that the program matched the offending program, it could refer the dispute to the FCC for settlement.

The example is offhand, and may not be practical. It is one that we, in Pacifica, would be happy to try to live with. However hard to administer or subject to argument, it does have the advantage of making the licensee seek to repair the damage done. Present sanctions tend only to punish him severely or not at all, without repairing the damage. The cease and desist order, although useful in

fairness cases, also has the disadvantage of making the broadcaster correct his present and future conduct; it does nothing about his past errors. If the requirement of producing and broadcasting an equivalent program is not the way to accomplish the desired result, perhaps a system of fines or of minutes or hours off-the-air during regular broadcast hours might be developed.

A second comment aims at the application of the fairness doctrine to the networks.

The networks are not licensed. The fairness doctrine reaches them only indirectly, by way of individual station licenses. Their stake in the broadcasting industry is such that they ordinarily conduct themselves with remarkable fairness in connection with such matters as personal attacks, political candidates and editorials. What they do not do as well is to deal with the great issues of the age in sufficient depth and rationality.

The FCC could arrange an annual "post-audit," a review of the performance of the networks in connection with controversial issues and public affairs and events. The danger is not that Huntley and Brinkley will attack some individual; it is that neither they, nor NBC, nor any major network, will consistently pursue the job of informing the citizens of the Republic about underlying problems of war and peace, foreign policy, the stock market, the automobile industry, public education, urban blight, minority oppression, or others of the dozens of major problems facing the nation. They do, in a few special hours, devote their talents to some of those matters; when they do, the results are enormously gratifying. Such programs should be encouraged and commended. But there are too few of them; they are not consistent; they provide no base for general judgment by citizens of the state of the world in which they live.

An annual serious public review, to which public comment would be admitted, would call both public and broad-

casters' attention to the facts of their performance. Such hearings might afford an opportunity for station owners to expose the grip in which they are held by the combination of the large advertisers and the networks, which is itself one cause for the overall "unfairness" of the networks' programming allocations.

My proposal as to the networks is to cause them to come annually before the public they are supposed to serve, and set forth their claim to have served it well. Such an annual review could take the place of any enforcement effort designed to make the networks live up to the letter of the fairness doctrine in individual cases. The networks have shown that they are responsible, cautious, and "fair" in the sense covered by the proposed new rules. The
36 FCC could well avoid the troubles of trying to enforce upon the networks what they themselves have long since adopted as their regular practice. It ought instead to see what it can do to get the networks to measure up to a general standard of overall fairness, since that is the trouble the public has with network programmers.

The FCC ought, on the other hand, to enforce the fairness doctrine far more strictly than it has in respect to individual stations in their non-network broadcasts. The fairness of the networks in treating persons and individual issues is not uniformly exhibited by other broadcasters. The problem, as I have acknowledged, is with policing the broadcasters. I think the FCC could identify the irresponsible broadcasters through changed license renewal procedures.

The FCC already requires that stations announce their forthcoming license renewal applications, and solicit comment to the FCC from their audiences. It would be merely an extension of this practice to hold license renewal hearings in the cities where the stations are, rather than in Washington. The FCC should cause the broadcaster to

announce the time and place of such hearings, and should provide a real opportunity to affected members of the public to make their judgments of the stations' performance known. Present renewal procedures do not even bring in many comments; they certainly do not enable the FCC to judge whether, and to what extent, there is citizen satisfaction with the performance of the licensee.

I do not say that the standard of the FCC's judgment should be popularity or financial success. It is the
37 FCC's task to assure diversity and responsibility. It does not do so through its present procedures; it has not the manpower to monitor the performance of licensees; it does not instruct the public about its rights and opportunities to affect the performance of broadcasters. The FCC needs to know whether, over the period of a license, the licensee *has been in general fair*; it ought to raise this question generally, as well as in connection with specific cases.

I believe such an examination before its public would be good for every radio or television station. The statistics are unarguable—most people like what they are getting from the broadcasting industry. However, they have little chance to find out whether they would like something else better, and little chance to tell the broadcasters what they like or want. The FCC could see that the public had a wider choice. It could give the public a chance to report on broadcasting to the broadcaster, whose attention now is directed not toward what people want to hear, but primarily to what will make them buy sponsors' products.

Expanding the Concept of "Fairness"

Finally, I commend to the FCC the proposition that "fairness" is not merely a matter of making certain that each broadcasting station "balances" in some quantifiable

measure, like minutes of air time, what anybody says on a particular issue at a particular time on that particular broadcasting station. Pacifica has long held to the view that fairness obliges it to seek out and present those views rarely heard by the public. We make a practice of broadcasting comments by communists, for example, and by members of the radical right (when we can find them) exactly because these views are not heard *at all* on most stations, and we believe it should be possible to hear them at least occasionally. Following this line of thought leads to the conclusion that, in an area where there are many broadcasting outlets, each might serve the "general fairness" by covering a part, not the whole, of the range of opinion on matters of public import. This would mean that the FCC, in considering new license applications, would be obliged to take into account what citizens of the area could already hear; it would also incline the FCC not to issue additional licenses for stations proposing to duplicate whatever was already widely available.

I recognize the thorny issues of public policy and judgment raised by this notion. I cannot permit the moment to pass, however, without asking the FCC to think a little about the whole of the public and the place of individual broadcasters in serving the whole public. It seems to me that the FCC lets itself be confounded by the narrowness of its vision when it examines a single licensee and the operation of his single station without regard for the other broadcasting services within the context of which the signals from that station are emitted. The post-audit public hearing, in the place where the licensee operates, is one means of bringing this context to the addition of the FCC at a time when it might properly affect its judgment.

42 **Comments of WIBC, Inc.**

WIBC, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. WIBC, Inc. is the licensee of Stations WIBC and WIBC-FM, Indianapolis, Indiana and Station WAII-TV, Atlanta, Georgia.

WIBC, Inc. opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and WIBC, Inc. believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they can-
43 not, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

WIBC, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

WIBC, INC.

By HALEY, BADER & POTTS
/s/ ANDREW G. HALEY
Andrew G. Haley
/s/ LOIS P. SIEGEL
Lois P. Siegel
Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
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45 **Comments of Storer Broadcasting Company**

Storer Broadcasting Company, by its attorney, herewith submits the following comments in the above-styled proceeding.

1. The Notice of Rule Making proposes to adopt rules codifying the "personal attack" portion of the fairness doctrine and the procedures to be used in the case of editorials endorsing or opposing legally qualified candidates.

2. According to the Notice:

> "Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

3. It is the opinion of Storer Broadcasting Company that a proposal such as this will inhibit the use of broadcasting for the airing of controversial issues discussions, and thus will work at cross-purposes with the alleged objective of the fairness doctrine itself.

4. In an area such as that encompassed by the fairness doctrine, the Commission must guard against estab-
46 lishing inflexible "penal" provisions; it should follow its own oft-repeated affirmation of the need for responsible licensee flexibility of judgment. Yet the proposed rules are little more than procedural devices upon which to base fines and forfeitures, and they are inflexible. Storer agrees with NAB and the other commentators in this proceeding who point out that police court procedures and police court atmospheres are not appropriate to the subject matter here involved, from the standpoint of con-

stitutional policy and also from the standpoint of administration—at the government *and* station level. While it is true that the Congress only recently gave the Commission the authority to assess fines and forfeitures for violations of its rules, it is doubtful that Congress contemplated the adoption of rules under which a government agency would determine *what* speech is fair and *whose* speech is fair, while holding the threat of immediate penalty over the remainder.

5. In granting renewal of license to Station KTYM, Inglewood, California, the Commission only three days ago stated:

> "To require every licensee to defend his decision to present any controversial program that has been complained of in a renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantive group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views." (Mimeo 85496, June 17, 1966)

It is difficult to see how this same result—suppression of controversial viewpoint broadcasts—could be avoided if the Commission were to adopt the instant proposal, which contemplates close federal supervision of the licensee's judgment and swift and sure punishment if he cannot successfully defend his judgments against "today's" official notion of what is fair.[1] The only sure way out of this dilemma would be for the broadcaster to avoid controversial matter entirely.

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[1] It is the history of communications censorship, of course, that the prevailing notion of today is more often than not the rejected notion of tomorrow.

Comments of the National Association of Broadcasters

6. For these reasons it is submitted that any proposal to codify and police "fairness" would be inappropriate, and that the instant proposal should be withdrawn.

Respectfully submitted,

STORER BROADCASTING COMPANY

By /s/ WARREN C. ZWICKY
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June 20, 1966

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48 **Comments of the National Association of Broadcasters**

On April 8, 1966, the Commission released a Notice of Proposed Rule Making in the above-entitled proceeding seeking codification into rules of its current policies pertaining to personal attacks and editorials in support of or in opposition to a legally-qualified political candidate.

The Commission states its action is for two purposes: "First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

At the outset, it should be recognized that the proposed rules may not be isolated from the rest of the fairness doctrine. If the entire doctrine itself cannot be sustained as a proper instrument of government policy, then the rules themselves, as an integral part thereof, must also fail.

Thus, the question is whether, both in concept and operation, the fairness doctrine encourages communication of controversial matters, promotes the communication
49 of unpopular as well as popular views and otherwise serves the objective of a fully-informed society. In our view, it does none of these. It discourages communication of controversial matters, restrains the vigorous debate of controversial questions and keeps serious issues beneath the surface of community attention. Therefore, it cannot be sustained because not only can it not increase the knowledge of the public, but actually operates in the opposite direction.

I. History of the Fairness Doctrine

The genesis of the fairness doctrine is said by the Commission to be contained in the public interest standards of the Radio Act of 1927. As early as 1929 the Federal Radio Commission stated in its Third Annual Report:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates, but to discussion of issues of importance to the public.[1]

This moral obligation to be fair and to avoid bias was accepted by broadcasters from the very beginning. However, in 1941 we find that the moral obligation is being transmuted into a legal one. The Commission, by dicta, in an unreviewable order, imposed a ban upon broadcast

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1 3 FRC Annual Report.

editorials that was to last until 1949. In its May-
50 flower decision the Commission wrote:

> Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[2]

This situation continued until 1949 when the Commission, following lengthy hearings, issued a detailed report in which it confirmed the right of broadcasters to editorialize. At the same time, however, it stated that the general public interest standard of the Communications Act required a licensee to (1) devote a reasonable amount of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so, he be fair—that is he affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[3]

Thus, the Commission assumed the right to condition the presentation of controversy upon the obligation to be fair. One can hardly envision the uproar that would result if the Post Office Department attempted to require the
New York Times, the Washington Post or the Chi-
51 cago Tribune to present, under threat of legal sanction, the other side as a condition precedent to taking a position on any controversial subject. Yet this is pre-

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[2] Mayflower Broadcasting Corp., 3 FCC 333, 340 (1941).

[3] 13 FCC 1246, 1249, 1252 (1949).

cisely the burden the Commission imposed upon broadcasters.

The next significant event in the chain came in 1959 when the Congress passed an amendment to Section 315 of the Communications Act exempting certain types of programming from the equal opportunities requirements of the section. It stated, in part:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[4]

By this time, the curious combination of factors that had permitted the doctrine to go unchallenged had also caused it to become so entrenched as to have its validity go unquestioned at both the administrative and congressional level.

Following the 1959 amendment, the Commission continued to apply the fairness doctrine on an *ad hoc* basis. Then in 1963 it saw fit to send to all licensees a Public Notice in which it called attention to three situations, one of which involved a licensee's obligations when a personal attack was broadcast:

52 "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific

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[4] 73 Stat. 557 (1959), 47 U.S.C. Sec. 315 (a).

offer of his station's facilities, for an adequate response."[5]

Now the Commission proposes to take this situation out of the policy area and adopt specific rules enforceable not only through revocation proceedings, but also through the use of the power to levy forfeitures.

What the Commission ignores is the fact that broadcasters agree they should be fair. The only area of disagreement is whether the obligation is a legal or moral one. The Government has always assumed it to be legal and, therefore, the power to apply sanctions in the event the vagaries of fairness are not met. And so, from an uncertain and ambiguous origin we see the fairness doctrine merge into an unquestioned position as basic regulatory philosophy.

In view of this, it might be well, as Professor John P. Sullivan of the George Washington University Law School suggests, to "test the validity of the reasons given for the rule in the decades past. Perhaps broadcasting is, as Professor Chafee stated, different. Perhaps licensing, or physical limitation, or the fact that the ether is in the public domain (if this latter concept has any meaning) breaks down the newspaper analogy, but the first
53 amendment ramifications alone justify another long look and more than a little renewed reflection."[6]

II. The Fairness Doctrine Constitutes an Abridgement of the Right of Free Speech.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting

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[5] 25 Pike & Fischer, RR 1899.

[6] Editorials and Controversy: the Broadcaster's Dilemma, 32 G.W. Law Review 719 (April, 1964).

the free exercise thereof; or *abridging* the freedom of speech, or of the press . . ." (emphasis supplied)

We think it significant that the word used in the Constitution is "abridge" rather than "censor." Censorship connotes the suppressing of a particular communication or deleting part of its contents, a prior restraint as it were. The word "abridgement," however, has a broader connotation. It means a dimunition, lessening or reduction. In other words, neither Congress nor its creature, the FCC, may diminish, lessen or reduce the right of free communication.

This is precisely the net result of the fairness doctrine. It discourages the use of broadcasting for the expression of opinion and thus abridges the right of the broadcaster as a communicator.

Historically, there are several limitations on speech that have been held not to violate the First Amendment. First, there are those which find their constitutionality in history and tradition, such as the common law of
54 defamation. Second, there are the prohibitions of speech which are offensive to the basic mores of our society, such as obscenity, profanity and the circulation of information about lotteries. Third, there are those limitations which prohibit the use of speech as a part of or as an incident to a prohibited course of conduct, such as disturbance of the peace, false advertising, and injury to the public health. Fourth, there are those limitations which prohibit words which are "used in such cimsumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[7]

While conceivably a single program or an editorial might fall within one of the above, broadcasting per se does not

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[7] *Schenck* v. *United States*, 249 U.S. 47, 52.

defame, is not offensive to the basic mores of our society, is not injurious to the public health, and does not present a clear and present danger.

Let us now consider the arguments which are usually made to justify the abridgement of freedom of speech by means of radio. One argument that finds favor is that broadcasting is different. Of course, broadcasting is different. It is different from the press. It is different from speech. But there is nothing in the First Amendment which says that because one medium is different from the other it loses its status as one of the fundamental freedoms.

55 Another favorite argument is that there is a limited number of frequencies available for broadcasting. The facts do not justify such an argument. There are today far more frequencies available than we had any idea of when we first began to regulate broadcasting. It is common knowledge that broadcasting stations outnumber daily newspapers by almost four to one.

Apart from this, however, there is nothing in the First Amendment which says that it is proper to abridge freedom of speech because of scarcity, whether it be a scarcity of public halls, of soap boxes, or churches, or printing presses, or newsprint. As a matter of fact, we are warned by conservationists that the supply of timber is being rapidly exhausted and we may have an acute shortage of newsprint in the not too distant future. Will this justify a fairness doctrine for newspapers?

Finally, it is said that the people own the airways and broadcasters operate in the public domain. Therefore, since private persons can be prohibited from using the spectrum, their privilege to use it can be conditioned in any way that Congress or the FCC, in their own discretion, deem desirable.

It is axiomatic that the power of government to grant or withhold a privilege does not carry with it power to bargain with a citizen for the surrender of his constitutional rights, the exercise of which can be directly or indirectly forbidden. This principle was set forth in clear and unequivocal language by Justice Brennan in *Sherbert* v. *Verner*.[8] "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In sum, it is clear that even though it be said that Congress merely extends a privilege which it is free to withhold—access to a microphone in the public domain—it nevertheless may not exact for that privilege the surrender of the right to freedom of speech. Assuming that the Constitution no more guarantees the private use of a microphone than it guarantees the private use of government buildings, once that use is permitted, the constitutional rights attach to and govern it. Indeed, if anything, the assumption that the Government has absolute discretion to refuse the private use of a means of communication makes it more than ever necessary that the constitutional rights be given the broadest reach.

III. The Fairness Doctrine Discourages Communication of Controversial Matters

By its very nature, any government regulation is restrictive to some degree. A rule or policy seeking to promote "free and open discussion" is no exception. It is one thing to acknowledge that an individual is "fair" to all parties with whom he deals. It is quite another to decree, by federal fiat, what conduct is considered "fair" and what is "unfair." This distinction is especially important

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[8] 347 U.S. 398 (1963).

in maintaining a continuing public dialogue on the important issues of the day. Yet, such a presentation is greatly inhibited by enforcement of the fairness doctrine.

When a broadcaster is faced with sanctions for
57 violating an amorphous policy or rule, he will weigh his actions in the regulated area with great circumspection. This may be a good result in situations conducive to regulation, but, as previously stated, in the realm of First Amendment rights, freedom from restriction is paramount. This freedom is the very essence of the atmosphere necessary for the open discussion of issues that the Commission seeks to preserve.

The basic problem with a legal concept of a fairness doctrine is that it has the effect of discouraging the use of broadcasting for expression of opinion. There is a basic inconsistency in a policy that encourages the voicing of controversy on the air while at the same time making it clear that the execution of fairness will be closely supervised. The mere idea of supervision in this area will discourage many broadcasters. Strict ground rules, such as proposed herein, will discourage more. The result will be the antithesis of what the rules hope to accomplish.

The existence of an obligation implies the existence of a sanction. However, not every obligation requires the same type of a sanction and, therefore, there must be a clear determination of the type of obligation before an appropriate sanction can be applied.

If a legal obligation exists, the Commission must examine the substance of the material broadcast; consider whether the subject matter is controversial or, in the case of the proposed rules, involves a personal attack; weigh what is given to each side; test the format for inherent fair-
58 ness; determine whether proper notice was given; and then tell the licensee he was either right or

wrong. This is the type of administrative fiat that has been the classic tool of censors from the beginning of communications. It involves judgments which just cannot be made by a government agency without inviting the evils of censorship. The establishment of such an obligation to be fair does nothing in our opinion to encourage the presentation of important public issues.

It must be remembered that the only means by which the broadcaster can obtain sufficient revenues to properly serve the public is through the sale of time. If the proposed rules were adopted, he would be forced to give away this product for a reply to a statement made over his facilities. If he did not do so, he would be subject to a forfeiture, a possible revocation of license, or, and this is entirely possible under the proposed rule, both. In short, he would be faced with the alternative of presenting all responsible sides under threat of government sanction or of not taking chances and avoiding all such presentations. This Hobson's Choice is sufficient to make broadcasters chary of committing any appreciable amount of time to the presentation of unpopular views or highly controversial subjects.

Perhaps the most invidious result of the fairness doctrine is that broadcasters are forced to do what the Constitution prohibits government from doing: acting in a manner that is tantamount to censorship. It is true that a licensee is responsible for everything that is transmitted over
59 his facilities, with the exception of statements made by a legally-qualified candidate. It is also true that the First Amendment is not absolute, and in certain carefully delineated areas, the freedom to speak is proscribed. It is the broadcaster's duty to prevent those utterances that are not given Constitutional protection. But he should not be forced to act in a manner which, directly or indirectly, tends to discourage the fullest exercise of free speech by others over his facilities. Government cannot interfere in this area and the fairness doctrine is not made

Constitutional by requiring broadcasters, under fear of sanctions, to act as censors.

Few would disagree with the objectives of the fairness doctrine, at least as applied to the media of mass communications. The vice, however, is that a government agency determines what is fair and what punishment shall be meted out to those judged unfair. When there is an end result that must be achieved at a licensee's peril, then a leverage is available to government that can induce conformity with certain preconceived ideas; and while it may not be deliberate or conscious, this does not make the result any less certain or more palatable. What in most businesses is a constitutional right to continue an honorable calling can become, because of a license system a mere privilege to be dispensed periodically to those who sustain successfully the burden of proving conformity with whatever standards of conduct the dispenser of the privilege may espouse.

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Conclusion

In all men of good will there is a drive to improve the world of which they are a part. That drive found a unique expression in this country in the establishment of our form of government, a government to which was granted certain specified powers and to which was forbidden by the Bill of Rights certain acts that might have been taken under those powers. It was delegated the power to regulate interstate commerce. It was forbidden the power to abridge freedom of speech. As the technology of the nation grew, so did the application of the Congressional reach to regulate commerce. In the 1920's radio communications had developed to the point that its regulation by the federal government as a species of interstate commerce became necessary for technical reasons.

Those who fashioned that regulatory framework established that public interest, convenience and necessity were

to be the tests under which licenses would be granted to communicate by radio broadcasting. At the same time it is clear that they wished to preserve the concept of freedom embraced within the First Amendment. So that there could be no doubt as to their intent, a specific provision was incorporated within the Act forbidding the Commission to censor or to pass or to promulgate or to fix any regulation or condition which interferes with free speech by means of radio communications. They left to the predecessors of this Commission and to this Commission the workable reconciliation between the injunction against interference with free speech and the power to regulate radio.

61 To the man who impatiently seeks the perfect world in his lifetime, wisdom has cautioned restraint lest when in a position of power he should set himself up as the arbiter over what may be transmitted and received in the flow of communications. It is not enough to be well-meaning. In fact, good intentions on the part of an encroaching authority may well be more dangerous than bad ones. Justice Brandeis put it this way: "Experience should teach us to be more on our guard to protect liberty where the government's purposes are beneficient."

In view of the above, the Association respectfully requests that the instant rule making be withdrawn and that broadcasters like other communicators be permitted to present one side or all sides from case to case as their expert judgment of the exigencies dictates.

Respectfully submitted,

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/s/ DOUGLAS A. ANELLO
Douglas A. Anello
General Counsel

June 20, 1966

62 **Comments of Mutual Broadcasting System, Inc.**

MUTUAL BROADCASTING SYSTEM, INC. (hereinafter referred to as "Mutual"), by its attorneys, hereby respectfully submits the following comments on the Commission's "Notice of Proposed Rule Making", in the above-captioned proceeding:

I. INTRODUCTORY

1. Mutual operates a national radio network to which are affiliated over 500 radio stations throughout the United States. Over 200 newscasts a week, plus a wide variety of programs of news commentary, public affairs and discussion programs are made available to affiliated stations through the network facilities of Mutual. Moreover, Mutual also provides its affiliates with on-the-spot, de-
63 tailed coverage of special events, such as Presidential news conferences, manned space flights, national political conventions, and election news coverage. Mutual's comments herein will be directed principally to those matters which have a direct bearing on its network operations, including its relations with its affiliates.

II. THE PROPOSED AMENDMENT TO SECTION 73.123 OF THE RULES IS IMPROPER AND UNWARRANTED

2. The Commission is here attempting to spell out, by rule, a licensee's obligations where, in the course of a program dealing with a controversial issue of public importance, a personal attack is made upon a person or group. To this end, the Commission seeks to formally codify the "personal attack principle" now embodied in its Fairness Doctrine. At the same time, the Commission also proposes to implement, by a specific rule, its pronouncements dealing with station editorials endorsing or opposing political candidates. Mutual is opposed to both proposed actions.

3. First, Mutual submits that the proposed amendments to Section 73.123 of the Rules represents an encroachment by the Commission upon the fundamental and exclu-
64 sive right of broadcasters to determine the content of their programming and the manner of presentation

thereof. For this reason, Mutual believes that grave Constitutional questions are presented by the proposed actions. (See Section 326 of the Communications Act.)

4. Secondly, the very proposal for such rules implies that broadcasters cannot be trusted to be "fair" in their presentation of controversial issues of public importance. Yet the paucity of cases dealing with the problem of concern herein establishes that Commission licensees do desire to be fair and have been fair, even in the absence of a published rule requiring the same. Hence, in Mutual's view, the proposed rules are unnecessary.

5. Thirdly, for all practical purposes, the proposed rules will discourage, rather than encourage, controversial programming and will promote bland, mediocre programming by licensees. Surely, if a broadcaster is in doubt as to whether or not the proposed rules will be applicable to a particular factual situation, and knows that his ultimate judgment on this might eventually be questioned, he will be inhibited, or will shy away from presenting controversial or provocative programming. Certainly such a result would not be consistent with the public interest.

65 III. The Text of the Proposed Rule

6. The proposed rules are vague insofar as they set forth no concrete standard as to what constitutes a "personal attack". Hence, they place an unfair, and probably an unconstitutional burden, upon the licensee.

7. If, despite the foregoing, the Commission adopts rules such as those proposed, it is requested that certain additional provisions be incorporated therein to take cognizance of the fact that some programming involving personal attacks may originate with a network, rather than with a particular station.

8. Where the attack is contained in a network program, Mutual believes that each one of the hundreds of stations carrying that program should not be required to transmit

a separate copy of the script or tape of the program to the person or group attacked. Instead, the network alone, should bear the responsibility for providing the copy of the script or tape. Moreover, the rules (if adopted) should provide that under such circumstances, the obligation to provide reply time to a person or group which has been attacked on a network program should properly devolve upon the network. The rules could require that if a station carried the original program containing the attack, it would be obligated to clear time for the network program containing the reply. In this latter connection, it must be recognized that not all Mutual affiliated stations carry all of its programs. Hence, machinery should be incorporated within the rules under which the network would notify its affiliated stations of the time being offered for reply purposes, thus providing the station with an opportunity to determine whether it is or is not obligated to carry the same. Absent some such provision, some stations might carry the reply which did not carry the original attack from its network.

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9. The very complexity of the problem of network-station relations in this area is another reason why it is neither feasible nor desirable for the Commission to attempt to incorporate into its published rules its so-called "Fairness Doctrine".

Respectfully submitted,

MUTUAL BROADCASTING SYSTEM, INC.

By /s/ JACK P. BLUME
Jack P. Blume
Fly, Shuebruk, Blume and Gaguine
1612 K Street, N.W.
Washington, D. C.

Its Attorneys

June 20, 1966

67 **Comments of Interstate Broadcasting Company**

Interstate Broadcasting Company, licensee of Stations WQXR and WQXR-FM, New York City, New York (hereinafter called Interstate), by its attorneys, respectfully submits these Comments, pursuant to the provisions of Section 1.415 of the Rules, with respect to the Commission's above-captioned rule-making proposal.

1. Interstate's interest in this proceeding relates, because of practical considerations, to the content of subparagraph (c) of the proposed rules relating to licensee endorsement of and opposition to candidates for public office. Interstate believes that adoption of the subparagraph (c) proposal would bring about a reduction in public service programming without any counterbalancing
68 benefit and that the fairness doctrine itself insures the aim sought to be achieved by the Commission without the necessity for rigid and unworkable requirements. Finally, by way of introduction, if the Commission finds it necessary to adopt specific rules dealing with licensee political editorials, such rules should be limited to situations where a licensee engages in an attack upon the "honesty, character, integrity or like personal qualities" of a candidate for public office.

2. Both the Commission and the broadcast industry have long recognized an obligation on the part of the broadcaster to be fair. The 1929 Annual Report of the predecessor Federal Radio Commission, for example, contained the following statement:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission

believes that the principle applies not only to addresses of political candidates but to discussion of issues of national importance."

And in 1939 the NAB Code provided that stations shall provide for the presentation of questions of public concern, including those of a controversial nature. In doing so, the Code specified that broadcasters should allot time "with fairness to all elements in a given controversy."

69 3. Although the industry itself, even apart from Commission pronouncements, recognized an obligation on the broadcaster to be "fair," the Commission apparently believed that special treatment was needed where the broadcaster had his own views on the merits of the controversial issue of public importance. Thus, in 1940 the Commission announced the *Mayflower* doctrine:

> "A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." *Mayflower Broadcasting Corp.*, 8 FCC 333 at 340.

The Commission, in effect, imposed by its *Mayflower* decision, an absolute ban on editorializing by its licensees with respect both to candidates for public office and other controversial issues of public importance.[1]

4. Owing to increasing broadcaster agitation against the editorial restriction imposed by *Mayflower*, however, the Commission undertook a reevaluation of the doctrine and,

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[1] In fairness to the Commission, it should be noted that at the time of the *Mayflower* decision many broadcasters agreed that a licensee should not editorialize over its facilities. In fact, the 1939 NAB Code contained what could be construed as a prohibition against editorial expression by licensees.

in 1949, issued its *Report on Editorializing,* 25 Pike
70 & Fischer RR 1901. By the *Report* the Commission retreated from the doctrine which it had espoused in *Mayflower,* and found no reason why broadcasters should not be extended the privilege of editorial voice subject always, of course, to the requirement of being "fair":

> "But where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail, prohibition of his expression of such position will not of itself insure fair presentation of that issue over his station's facilities, nor would open advocacy necessarily prevent an overall fair presentation of the subject. It is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial. In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions or make more difficult the enforcement of the statutory standard of fairness upon any licensee." *Report on Editorializing,* 25 Pike & Fischer RR 1901 at 1909-10.

Interstate thinks it fair to state that since the release of the *Report on Editorializing* the Commission has, and most particularly in recent years, actually encouraged,
71 through the various means at its disposal, editorialization by its licensees.[1] Interstate fears, however,

[1] See, for example, Address of Newton Minow before the National Association of Broadcasters, May 10, 1961.

that adoption of the rules proposed herein may result in an effective return to the *Mayflower* doctrine.

5. Interstate does not disagree with the aims sought to be accomplished by the Commission's fairness doctrine, and, correspondingly, by the rules proposed herein. As a broadcaster it readily admits to an obligation to insure a fair presentation of all responsible views on issues of public importance.[2] Similarly, the procedures reflected by subparagraph (a) of the proposal dealing with attacks upon the "honesty, character, integrity or like personal
72 qualities of an identified person or group" should be followed, as Interstate does, by broadcasters in order to protect the public and insure fairness. Interstate cannot, however, agree that there is any merit in the subparagraph (c) proposal which would eliminate virtually all licensee discretion when it editorializes in favor of or in opposition to a legally qualified candidate.

6. In reiterating the obligation of the broadcaster to be fair in the *Report on Editorializing*, the Commission there, and in numerous subsequent rulings, emphasized that this is an area for substantial licensee discretion. Perhaps, the Commission's best statement of this philosophy is contained in the *Report* itself wherein the Commission asserted:

> "[T]here can be no all embracing formula which licensees can hope to apply to insure the fair and

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2 Interstate does not, however, necessarily agree with the Commission that the obligation to be fair is appropriately considered a *legal* obligation. See, for example, Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 George Wash. L. Rev. 719 (1964). Interstate realizes that at this late date the Commission will not decline to adopt rules on "First Amendment" grounds. At least as early as 1940, the Commission announced its belief that the obligation of a broadcaster to be fair is a "legal requirement," 6 FCC Annual Reports 55. The legal position of those advocating the unconstitutionality of a Commission-enforced fairness doctrine has been often stated (as in Mr. Sullivan's article cited above). For these reasons Interstate does not propose to engage in a dissertation on this point.

balanced presentation of all public issues . . . . The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as to whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or
73 whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . . " 25 Pike & Fischer RR at 1907.

7. With all due respect, Interstate submits that the Commission is evidencing ambivalence in the extreme by pronouncements such as the foregoing recognizing a broad area for licensee discretion in programming as compared with the rule-making proposals herein, particularly subparagraph (c), whereby the Commission would virtually eliminate all semblance of licensee discretion in a particular area of its programs. We also submit that subparagraph (c) of the proposed rules is far from consistent with the Commission's previous encouragement of licensee editorials unless the Commission can accept as palatable (which we cannot) the idea that a government agency has the prerogative to classify certain types of editorials as "good" but others as "bad" and to promote some as "desirable" and others as "undesirable."

8. In effect, subparagraph (c) of the proposed rule says there is only one way to be fair if a broadcaster editorial-

izes with respect to candidates for public office. In paragraph 7 of the Notice the Commission does assert that the rule is not all-encompassing and that judgments will still have to be made by the licensee. Curiously, however, of the examples advanced by the Commission virtually all are designed to show that a licensee will have to do more than that required by the rule in order to be fair. Interstate submits that a licensee can editorialize with respect to political campaigns and still be fair in presenting the candidates to the public without adherence to the rigid requirements of subparagraph (c). The Commission should trust the broadcasters, the vast majority of which are responsible, with the discretion which has always inhered in fairness doctrine situations.

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9. The Commission must realize that editorials, even in political campaigns, are not to be equated with personal attacks. By the proposed rule even an "endorsement" of candidates in an editorial requires notification and an offer of an opportunity to respond. Such an endorsement, however, will seldom involve any of the aspects of an attack, will seldom vilify or deprecate the unendorsed candidate and frequently will simply indicate a slight preference between two capable men. The Commission has offered no reason, practical or otherwise, why the licensee must send a transcript to unendorsed or opposed candidates with an offer for time to respond even where, as is to be expected, the licensee's programming with respect to the campaign is in conformity with the fairness doctrine.

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10. We fear that the result of such a rule would be a reduction in public service programming. An editorial can be of any effect only if the editorialist has the respect of the public for well-reasoned judgment and, we submit, with perhaps rare exception, only the responsible gain that respect. But a rule such as that proposed would, because

of "logistics" problems, result in editorials simply not being aired.

11. Interstate's stations are located in New York City, New York. For a number of years it has been the policy of Interstate, which is a wholly-owned subsidiary of *The New York Times,* to broadcast editorials. It has done so in the belief that such broadcasting is a service to the public. Further, it has been the policy and practice of Interstate to read on the air certain editorials which are scheduled to appear the following morning in *The New York Times.* The broadcast editorials may deal with local or national issues, or with local or national political campaigns.

12. As one example of the "logistics" problems involved, consideration should be given the large number of United States House of Representatives Districts in the New
76 York City metropolitan area and the considerable number of candidates involved in primary and later elections. *The New York Times* will often use a column of editorial page space designating its preferences in all of these races. Under the proposed rule, if Interstate broadcasts such an editorial, which would be both interesting and helpful to its listeners, it would be subjected to the requirement that all candidates be notified and offered time for a "meaningful response."

13. When this requirement is projected in terms of multiple campaigns in metropolitan markets, the prospects of administration become awesomely formidable. The net result would be that the editorial would not be broadcast and that listeners would be deprived of a respected editorial voice with no corresponding benefits because fairness is already insured by the doctrine itself.

14. Furthermore, when the proposed rule is thought of in terms of the national elections, the result becomes

ludicrous—perhaps more so for a small market station than others, but only to a degree. We submit that it would be absurd to have required a station endorsing President Johnson in the last campaign, be it located in New York City, New York, or Truckee, California, to offer Mr. Goldwater an opportunity specifically to respond or vice
77 versa. Since stations are already committed to a standard of fairness there is simply no reason to retreat to the days of *Mayflower* relegating broadcasters to second-class journalistic status, by such rigid and unworkable requirements.

15. We think some objection should be voiced also to the Commission's assertion at paragraph 7 of its Notice that by subparagraph (c) it is proposing simply to "implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates." What the Commission is in fact doing is seeking to convert dicta from *Times-Mirror,* 24 Pike & Fischer RR 404, into a specific rule which would be applied to factual situations far different from that which existed in *Times-Mirror.*

16. The rules proposed herein cover mere endorsements of candidates as well as personal attacks. In *Times-Mirror,* however, an aggravated factual situation was presented. There, the licensee permitted the use of its facilities by two broadcast commentators who were given to repeated and rather harsh personal attacks upon political candidates and who could not have been considered "responsible spokesmen" for any side of a particular issue involved. Clearly, personal attacks were present and while perhaps any editorial favoring or opposing a political candi-
78 date might be said to be within the purview of dicta in the *Times-Mirror* case, we submit that the holding in that case must be considered in light of, and limited to, its own exaggerated factual setting. To assert unilaterally,

as the Commission has, that subparagraph (c) of the proposal is simply an embodiment of the *Times-Mirror* ruling, is, we submit, an unfair presentation on an issue of importance.

17. If the Commission persists in its apparent aim to adopt rules in this area, Interstate believes that it would be far better to limit the requirements of subparagraph (c) to "personal attacks" and, in this regard, Interstate suggests the following:

> "(c) When a licensee, during the presentation of an editorial, endorsing or opposing a legally qualified candidate or candidates for public office, attacks or criticizes by name the ability, qualifications, honesty, character, integrity or like personal qualities of a legally qualified candidate or candidates for public office, the licensee shall, within 24 hours after the presentation of the editorial, transmit to the candidate or candidates so attacked or criticized (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities."

18. The suggested modification would still impose upon a licensee engaging in a personal attack on a candidate for public office, *procedural* obligations beyond those
79 contained in subparagraph (a). On the other hand, it would entrust to the licensee the good faith discretion which the Commission has always honored in fairness doctrine situations to ensure a fair presentation, where an endorsement or opposition in a political campaign does not constitute an attack upon a candidate's "ability, qualifications, honesty, character, integrity or like personal qualities."

CONCLUSION

WHEREFORE THE PREMISES CONSIDERED, Interstate respectfully urges that the Commission terminate this proceeding without the adoption of rules or, in the alternative, that it adopt the proposed rules only as modified consistent with the suggestions contained herein.

Respectfully submitted,

INTERSTATE BROADCASTING COMPANY

/s/ REED MILLER
Reed Miller

/s/ DAVID H. LLOYD
David H. Lloyd
Arnold & Porter
1229 19th Street, N.W.
Washington, D. C. 20036

June 20, 1966

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81 **Comments of Trigg-Vaughn Stations, Inc.**

Trigg-Vaughn Stations, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Trigg-Vaughn Stations, Inc., is the licensee of Station KOSA-TV, Odessa, Texas, Stations KROD and KROD-TV, El Paso, Texas, Station KITE, Terrell Hills, Texas and Station KRNO, San Bernardino, California. It is also affiliated in ownership with Station KOSA, Odessa, Texas, Station KHOW, Denver, Colorado and Stations KDEF and KDEF-FM, Albuquerque, New Mexico.

Trigg-Vaughn Stations, Inc., opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Trigg-Vaughn believes that not only is there an ab-

sence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
82 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Trigg-Vaughn Stations, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

TRIGG-VAUGHN STATIONS, INC.

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
Washington, D. C. 20036

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84 **Comments of Meredith Broadcasting Company**

Meredith Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above captioned proceeding, released on April 8, 1966. Meredith Broadcasting Company is the licensee of Stations KCMO, KCMO-

FM, and KCMO-TV; Kansas City, Missouri and Stations KPHO and KPHO-TV, Phoeniz, Arizona, and is the corporate parent of Stations WOW, WOW-FM and WOW-TV, Omaha, Nebraska, and Stations WHEN and WHEN-TV, Syracuse, New York.

Meredith Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Meredith believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
85 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Meredith therefore respectfully urges that the above captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

MEREDITH BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

June 20, 1966 *Its Attorneys*

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86 **Comments of National Broadcasting Company, Inc.**

National Broadcasting Company, Inc. ("NBC") herewith submits its comments on the Commission's proposed rule set forth in the Notice of Proposed Rulemaking in this proceeding ("Notice").

In submitting these comments NBC does not wish to be understood as favoring the Commission's "fairness doctrine", since NBC has serious question as to the principle of governmental intervention in broadcast journalism. NBC agrees that the public should receive a fair representation in discussion of controversial issues of public importance, but NBC does not favor governmental action to enforce such representation by regulations.

87 SUMMARY OF NBC POSITION

NBC is opposed to the rule proposed in the Notice, for the following reasons: (1) the fairness doctrine does not apply to personal attacks as such; (2) no public interest is served by the proposed rule; (3) the proposed rule contravenes standards of fairness heretofore established; and (4) the proposed rule imposes an unreasonable obligation on the licensee.

I. THE FAIRNESS DOCTRINE DOES NOT APPLY TO PERSONAL ATTACKS AS SUCH

The fairness doctrine applies only to the discussion of controversial issues of public importance. This is clear from the proviso to Section 315(a) of the Communications Act, upon which the Commission relies for its authority to adopt the proposed rule, and from the Commission's own definition of the fairness doctrine in paragraph 2 of the Notice. The Commission has itself made the distinction that the fairness doctrine applies to *issues*, not individuals. (Letter of October 10, 1960 to Freedman and Unger).

88 NBC does not believe that a personal attack, even if made during the course of a discussion of a controversial issue of public importance, is necessarily in and of itself a discussion of a controversial issue of public importance. For example, instances in which NBC has been asked by the Commission to comment on complaints of alleged personal attacks have included one in which a governor referred to an individual as a communist and another in which a candidate referred to a named organization as scurrilous. Both comments were made in the course of discussions of controversial issues of public importance, but those issues were not the "character" of the person or organization involved. Neither "attack" could be deemed itself to be a controversial issue of public importance, and in fact in neither case did the Commission rule that the fairness doctrine required time to be given the person or organization "attacked".

The Notice apparently recognizes that it is converting the "fairness doctrine" from its past application to controversial issues of public importance, and applying it to "personal attacks" not necessarily constituting controversial issues of public importance. Thus, although the Rule speaks in terms of personal attacks which occur
89 "during the presentation of views on a controversial issue of public importance", it does not require that the personal attack *itself* be a controversial issue of public importance.

This is not merely a semantic difference. Most "personal attacks"—even those taking place during a discussion of a controversial issue of public importance—do not themselves constitute controversial issues of public importance. It has been NBC's experience that during the course of programs presenting controversial issues of public importance, the names of many public officials and other persons are mentioned, and indeed many of these individuals may themselves be discussed. However, these ref-

erences are only incidental to the substantive issue which constitutes the controversial issue of public importance being discussed and which heretofore has been considered to be the only area subject to the Commission's "fairness doctrine".

It must also be noted that the proposed Rule applies only to those personal attacks which take place during the presentation of views on a controversial issue of public importance. This, of course, does not alter the
90 nature of the attack itself, although it does introduce a further inconsistency—an attack in a variety entertainment show would give rise to no action under the rule, while an attack on a news interview program might.

II. No Public Interest is Served by the Proposed Rule

In its 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, and again in its *Fairness Primer,* Public Notice of July 1, 1964 29 Federal Register 10415, the Commission stated the basis of the fairness doctrine:

> "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

The right of the public to be informed is not promoted by requiring a licensee to make time available for reply to a personal attack. Rather, unless there is a controversial issue of public importance involved, the proposed rule would in effect legislate a requirement that the public broadcast channels be used to afford a private remedy for a private wrong for which the remedy at law has sufficed for many years.

91. The Commission, in its *Editorializing Report,* did not suggest any such private remedy. A fair read-

ing of a fuller portion of the *Editorializing Report*, 13 FCC 1246, 1251-52* (1949) than is quoted in paragraph two of the Notice demonstrates that that Report did not consider that an attack on a specific person or group would *itself* constitute a controversial issue of public importance requiring the invocation of the "fairness doctrine". Rather, the fact that a person or group has been specifically attacked over the station was stated as possibly being a factor which must be considered along with such other questions as the subject, the particular format of the programs, and the different shades of opinion to be presented, as part of the station's general consideration of whether to honor a specific request by a particular person or group. It was only in discussing licensee treatment of such a request that the question of personal involvement or "attack" was adverted to in the Report. The full paragraph was as follows:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues.
>
> 92 "Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a

* Erroneously cited in the Notice as page 1258.

sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts." (13 FCC at 1251-52)

Thus, the Notice quoted half of the sentence referring to "attacks", and constructed on it a wholly different principle than originally intended. Instead of a fairness
93 doctrine issued to serve the public interest in controversial issues of public importance, the Notice proposes a private remedy for individuals and groups, with only a tangential relationship to controversial issues of public importance.

III. The Proposed Rule Contravenes the Standards of Fairness Heretofore Established by the Commission

The Commission has properly made no attempt to codify its concept of the fairness doctrine. Instead, it has outlined in the *Fairness Primer* (29 F.R. 10416) a broad standard of good faith effort by the licensee to be fair in the treatment of controversial issues of public importance:

" . . . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in

good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. . . . . "

94 The proposed rule completely ignores such a standard, substituting a rigid approach. If a personal attack were made, the licensee would be required to take the specific steps of (1) notifying the person or group attacked of the date, time, and identification of the broadcast on which the attack was made and a script, tape, or summary of the attack; and (2) offering a reasonable opportunity to respond over the licensee's facilities.

Instead of leaving licensees free to determine in what fashion the controversy should be handled, the proposed rule would adopt the personal "equal time" approach previously confined to the special situation of candidates for public office. The only real judgment a licensee would be permitted to make—and that made subject to being "second-guessed" by the Commission—is one whether a personal attack had occurred over his facilities.

Beyond that point, the proposed rule would substitute the Commission's judgment for that of the licensee by imposing on the licensee a rigid standard of conduct determined by the Commission.

95 Similarly, the proposed rule disregards the above-quoted language from the *Editorializing Report*, which spelled out at some length that the licensee need only

act reasonably and in good faith on a request for time to present a point of view on a controversial issue of public importance—in which a personal attack on the requester over the station is a factor to be considered.

IV. The Proposed Rule Imposes An Unreasonable Obligation on the Licensee

The proposed rule would place upon the licensee a greater obligation and a heavier burden than that imposed by the Commission with respect to equal opportunity. Section 73.657(e) of the Commission's Rules requires that a request for equal opportunities be submitted *to* the licensee within one week of the day on which occurred the use for which equal opportunity is claimed. The licensee is not required to take any *affirmative* action—only to pass upon a timely request by the candidate seeking equal opportunities.

96 Furthermore, under the proposed rule, if a personal attack occurred on a licensee's station, the licensee should be required to offer the person attacked a "reasonable opportunity" to reply, even though the attack was a spontaneous utterance as to which the licensee had no advance knowledge.

Hence, not only would the proposed rule charge the licensee with responsibility for attacks which he cannot guard against in advance; by requiring him to *volunteer* time for a reply, rather than await a request, the proposed rule would imperil his license every time he was called upon to decide whether a personal attack had occurred in the presentation of views on a controversial issue of public importance. Depending upon how the Commission were to interpret a "personal attack", the licensee would be faced with the alternative of jeopardizing his license or giving time to a complainant to reply to a spontaneous remark of a critical personal nature; maybe, even, giving time

to the manager of a cellar-dwelling baseball team to assert that he is not, either, a bum.

97 This possibility is not a far-fetched one. The Notice herein stated that the phrase "reasonable opportunity" had been used rather than "comparable opportunity", because the broadcast calling the rule into operation may involve only a few seconds, and reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. (Paragraph 7)

Finally, the proposed rule would require the licensee to offer time for reply to any person or group attacked by a candidate, unless the person or group fell within the category excluded in paragraph (b) of the proposed rule, although the licensee has no power to censor the candidate and no legal liability for any defamation the candidate may utter.

In contrast to these consequences, both the proviso to Section 315(a) of the Communications Act and the Commission's own declaration of the fairness doctrine call only for the licensee to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The proposed rule is a far cry from one in which the licensee is called upon "to exercise his best judgment and good sense in determining what sub-
98 jects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view". (*Editorializing Report,* paragraph 10)

On the other hand, where a personal attack is broadcast by or at the direction of a licensee, or a licensee editorial presented supporting or opposing specific candidates, considerations of fairness would ordinarily point to the licensee's affording an opportunity for a reply, regardless of

the existence or non-existence of a specific rule on the matter.

V. Other Comments

Paragraph (b) of the proposed rule would make the rule inapplicable to personal attacks by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign. Since NBC opposes the proposed rule in its entirety, NBC is in favor of any exclusions from the proposed rule. However, the exclusion should be
99 phrased more generally. As phrased, it gives rise to the question who is an authorized spokesmen or a person associated with the candidate; the question can be avoided by excluding all attacks "by a legally qualified candidate or his supporters", regardless of upon whom made. Along the same line, paid political programs or announcements should be entirely excluded from the proposed rule.

VI. Conclusion

In view of the foregoing considerations and with the reservation above expressed as to the basic validity of the fairness doctrine, NBC submits that the proposed rule should be rejected and the proceeding terminated, or at most a rule adopted which would apply only to personal attacks broadcast by the licensee or at his direction and to licensee editorials supporting or opposing candidates. If not rejected or restricted as suggested above, the rule (a) should under no circumstances apply to statements in any paid political program or announcement or to any statements by a candidate or his supporters, and (b) should not require the licensee to take affirmative action in offering time for reply, except where the attack has been made
100 by the licensee or at his direction, or in the case of a partisan licensee editorial; and except in either of

the latter situations, the person or group attacked should have a limited time, such as seven days, within which to request time for a reply.

Respectfully submitted,

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June 20, 1966

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102 **Comments of Columbia Broadcasting System, Inc.**

Columbia Broadcasting System, Inc. (CBS) respectfully submits these Comments in response to the Commission's Notice of Proposed Rule Making (Notice) in this proceeding, which looks toward the adoption of rules establishing procedures to "make more precise licensee obligation" in the area of "personal attacks" and certain political editorials and to "assist the Commission in taking effective action in appropriate circumstances where the procedures are not followed." (Par. 3, Notice.)

Comments of Columbia Broadcasting System, Inc.

Section 73.123(a) of the proposed rules would provide that, when, "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must furnish to such person or group a script, tape or summary of the "attack" along with other information about the broadcast and offer such person or group "a reasonable opportunity to respond over the licensee's facilities"—subject to certain exemptions provided for in Section 73.123(b).

103 Section 73.123(c) would require that when "a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office" a copy of the editorial along with other information about the editorial together with an offer of "a reasonable opportunity . . . to respond over the licensee's facilities." Thus, the Commission, is for the first time, proposing to impose by specific rules "precise" obligations on licensees in their application of some aspects of the fairness doctrine with all the attendant penalties which accompany violations of Commission rules.

CBS opposes the adoption of these rules. While we do not condone unfair personal attacks on the air, we believe these rules come dangerously close to, if they do not actually encroach on, the boundary lines of the First Amendment. They are not required by public interest considerations, and, in fact, will not serve the goals the Commission seeks to advance.

• • •

The personal attack doctrine was formulated as a special case under the broader and more fundamental fairness doctrine. The fairness doctrine was intended to serve the

public interest in the widest dissemination of information and conflicting views on current affairs and public issues rather than to provide an extrajudicial remedy for *private* parties. In implementing the doctrine, the Com-
104 mission stated in its 1949 report on "Editorializing By Broadcasting Licensees" and reemphasized in its July 6, 1964 Public Notice on the fairness doctrine that the licensee must have complete discretion to determine "what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." The Commision pointed out, in its 1949 report, that in some cases an individual's "personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." Clearly this language anticipated an exercise of discretion on the part of the licensee. The Commission now proposes for the first time rules that would inflexibly require that, whenever such "personal attacks" occur, then without any exercise of discretion on the part of the licensee and without any consideration of the varying circumstances necessarily involved in such cases, the station must turn over its facilities to another regardless of his relationship to the main issue involved. As a consequence of the rules, the Commission would have the power to levy fines and possibly revoke licenses for non-compliance.

The proposed rules in this matter raise serious questions within the purview of the First Amendment and with respect to the proper scope of the Commission's powers in regulating program content and the day-to-day
105 operations of licensees. CBS believes that these rules would place constraints on freedom of speech

and freedom of the press. The First Amendment is media blind; it is as much violated by the Commission's directing a licensee to present an individual speaking on an issue the Commission finds "controversial" as it would be if the United States Post Office Department demanded the publication by *The New York Times* of the same statement at the risk of losing its special mailing privileges. CBS agrees that:

> ". . . the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise."

This was the Commission's response (in its 1960 Report and Statement in the En Banc Program Inquiry) to suggestions that it require licensees to present specific types of programs on the theory that such action would enhance freedom of expression.

In the Notice the Commission recognizes "'that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred . . .'" (Par. 4.) We believe this uncertainty will be the usual rather than the exceptional case, especially for stations which broadcast a substantial amount of informational programming. Uncertainties such as this, together with the threat of burdensome administrative proceedings and pos-
106 sible forfeiture or revocation of licenses, will inhibit broadcasters from presenting vigorous opinions on current issues; rather, the bland and innocuous will in effect be encouraged. In proposing these rules the Commission seeks to assume the role of arbiter in determining whether certain speech in a particular broadcast is "controversial" and whether the language complained of in-

volves the "honesty, character, integrity or like personal qualities" of a person or group and where the licensee's decison is found wanting by the Commission—to punish the station through fines and possible license revocation. The Commission cannot arm itself with this power.

The proposed rules are therefore inherently incompatible with the constitutional requirement that channels of expression must be free of governmental coercion.

Further, the proposed rules intertwine the public interest in free debate with consideration for the private interests of individuals. This protection for private interests is not an objective of the fairness doctrine and is not an appropriate subject for rigid administrative regulation. In covering current issues of the day, basic journalistic techniques impel a broadcaster to obtain the views of a person subjected to attack. Inflexible governmental rules are unnecessary and undesirable in this area. Moreover, the fairness doctrine is concerned with the presentation of issues, not with the personal interests of any individual in his own prestige or reputation.

The proposed rules, to the extent they seek to protect private interests of persons who may be involved in
107 public controversy, would unnecessarily intrude the Commission into the day-to-day operations of licensees and jeopardize their legal rights. The definition of "personal attack" (an attack on an "individual's or group's integrity, character or honesty or like personal qualities") closely parallels the traditional standard of defamation. The private interests of persons who may be the subject of "personal attacks" are protected by the law of defamation. In some instances, of course, the public interest in free and unfettered discussion requires a limitation on such private remedies for there is indeed a:

> "profound national commitment to the principle that debate on public issues should be uninhibited, robust,

and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964).

The broadcaster, no less than any other journalist or indeed any other individual, has certain defenses against charges of defamation, among which are truth and privilege of fair reporting of legislative, administrative and judicial proceedings. These defenses are rooted in the overriding public interest embodied in the First Amendment in uninhibited public debate and free flow of information to the public. The proposed rules, by requiring admissions on the part of the broadcaster, could well jeopardize these defenses. In addition, as a result of the rules proposed, the broadcaster might become subject to administrative penalties in a Commission proceeding where none of his legal defenses would be available.

108 Moreover, we submit that the proposed rules will not guide but will confuse. The Commission recognizes in its Notice the uncertainties involved in administering and interpreting the proposed rules. Thus the Commission states "in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions." It is difficult to reconcile this uncertainty with the Commission's announced objective of achieving a more precise delineation of licensee responsibility in this area. While the Commission states that the rules are directed to situations where "there could be no reasonable doubt under the facts that a personal attack had taken place", the Commission then cites, as examples of situations clearly within the proposed rule, statements calling a public official or other

person an embezzler or a Communist. We are not, however, convinced that even these situations are as clear as the Commission suggests. Assume that the persons involved are Communists. The Commission itself, in ruling number 6 in its July 6, 1964 Public Notice "Applicability Of The Fairness Doctrine In The Handling Of Controversial Issues Of Public Importance", stated that "it was not and is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." There is no indication that the Commission intends to change its position on this for the Notice states that the Commission proposes "to codify the procedures which licensees are required to follow in personal attack situations." Many other comparable situations spring to mind where the appearance of a
109 particular individual would not further the public dialogue. We believe that these decisions should best be left to the licensee directly involved who is, of course, possessed of more information on the personalities and issues involved.

Another indication of the confusion which the adoption of the proposed rules will cause is that while the rules appear to apply to all types of broadcasts, we must assume that they are inapplicable to those classes of broadcasts which the Commission has previously excluded from the scope of the personal attack rule. Thus in the *Times-Mirror* ruling, 24 R.R. 404 (1962), which the Commission cited in the Notice, the Commission wrote:

> "The Commission's ruling, however, must be construed in the context of the facts giving rise thereto. Thus, newscasts, news interviews, etc., or, indeed, the above-mentioned discussion programs would not, as a general matter and absent conditions such as those discussed in the Commission's telegram, appear to be encompassed by the Commission's ruling. As

to the above-mentioned discussion program, it appers that both parties were equally represented, and, therefore, it seems clear that opportunity was afforded for opposing viewpoints on all of the issues discussed."

Moreover, in connection with the broadcasting of the CBS REPORTS documentary "Biography of a Bookie Joint", although allegations were made to the Commission that the broadcast represented an attack on the Massachusetts Legislature through the remarks made in the documentary by a member of that legislative body, CBS did not offer time to the Legislature and was not required to do so by the Commission.

We believe that the rule proposed by the Commission relating to station editorials in favor of or in opposition to political candidates is unwise and is open to many of the objections we have previously noted with respect to the personal attack rules. Here again the Commission has failed to indicate the reasons which require adoption of a rule in this area. Its latest (1964) SURVEY OF POLITICAL BROADCASTS, likewise gave no indication of any abuses by licensees in this area. In effect, the Commission proposes through this rule to broaden the "equal opportunities" provision of the Communications Act. Similarly, the proposed rule is made mechanically applicable to all such station candidate editorials, regardless of the time a station otherwise makes available to candidates in its total schedule. It is indeed possible that a licensee's attempt to comply with the proposed rule might lead in some instances to a serious imbalance of time on its facilities, in favor of the candidate who is the recipient of the station offer of time required by the proposed rule.

While the procedure prescribed by proposed Section 73.123(c) may seem desirable to some licensees, there does

not appear to be any compelling reason for it to be embodied in an inflexible rule and forced upon all licensees. Since a licensee is, in any case, required to maintain fairness and balance in its overall coverage of a
111 campaign, its editorial statement which is merely a part of that coverage, should be judged within that framework. In this connection, it may be noted that the rule purports to prescribe conduct in the event a licensee "endorses" a candidate in an "editorial" without defining what constitutes either an "editorial" or an "endorsement."

The proposed rule will deter some broadcasters from engaging in political activity in the same way that the Commission's interpretation of the "equal opportunities" requirements of Section 315 has curtailed the time which some licensees would otherwise make available to political candidates. We cannot believe that this is the intention of the Commission. The proposed rule seems to be at cross purposes with the exercise of First Amendment freedoms by broadcasters and with the public interest in having broadcasters contribute through their broadcasting to the ascertainment and discussion of community problems.

* * *

In conclusion we believe that proposed Sections 73.123(a), (b) and (c) are inconsistent with the basic principles of the First Amendment and are not in accord with the public interest. We believe that adoption of these rules will result in a continuing and growing involvement of the Commssion in the news judgments of licensees. For the first time since the Commission promulgated its fairness doctrine, it now seeks to judge licensee compliance
112 with the fairness doctrine on the basis of individual incidents. The proposed rules would substitute inflexible Commission-dictated procedures for the good-faith exercise of discretion by licensees. For these reasons,

CBS opposes the adoption of proposed Sections 73.123(a), (b) and (c).

Respectfully submitted,

COLUMBIA BROADCASTING SYSTEM, INC.

By /s/ LEON R. BROOKS
/s/ ALBERT HAYDEN DWYER
/s/ JOSEPH DEFRANCO
/s/ PAUL N. STERNBACH
/s/ RALPH E. GOLDBERG
/s/ ELEANOR S. APPLEWHAITE

Its Attorneys

51 West 52 Street
New York, New York 10019

June 20, 1966

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113 **Comments of Carroll M. Barringer**

Carroll M. Barringer, licensee of Radio Station WLCO, Eustis, Florida (WLCO), by its attorneys, submits these Comments in opposition to the Commission's proposal to amend its Rules relating to Editorializing. In support hereof, the following is shown:

1. It is believed that the proposed Rules are essentially based upon the concept that broadcast licensees are lacking in "responsibility" and, therefore, specific Rules are required in order to "enforce" responsibility. It is submitted that the facts dictate the contrary. The vast majority of licensees have demonstrated a substantial sense of responsibility and awareness of the obligations of broadcasters. Stations which are operated by such
114 responsible licensees, in treating upon controversial issues, are entirely competent to effectively produce

a contradictory point of view and to substantiate this viewpoint without the inference of personal character defamation. Moreover, the "attack" concept is impossible of precise definition. Certainly in cases where an "attack" is made, the subject of the attack already has ample remedies available. For example, a specific ruling may be requested of the Commission and a determination made whether the licensee involved has sufficiently discharged his obligation to insure fair presentation of all viewpoints and, if not, that licensee may then be required to discharge that obligation. Should there, in fact, be actual character defamation, there already exist ample civil remedies in way of damages—actual *and* punitive—which may be imposed by a judicial body entertaining a greater expertise in what is then essentially a "civil" matter.

2. It is the opinion of WLCO that the Commission would better fulfill its role by imposing more intensive standards regarding the qualification of applicants before facilities are granted to such applicants, rather than attempting to, in effect, regulate program content after having granted a license. Once the Commission has granted
115 a license, in the opinion of WLCO, full and complete responsibility for program content should thereafter be vested in the licensee of the facility involved. As already noted, any flagrant violation—such as defamatory conduct—or any infringement upon the legal and constitutional rights of any individual, group or organization, may then be reconciled and resolved in a court of law.

3. It is also believed that administration of the proposed Rule would be a practical impossibility. It cannot be conceived that the Commission is in a position to effectively comprehend all of the background involved in a particular Editorializing situation. For example, a licensee—*in the discharge of licensee responsibility*—may necessarily be required to "attack" a corrupt official. Such action, while

a responsible one, may not be consistent with "political" wisdom. The official, for example, may be in an influential position and thus able to bring pressure to bear upon the Commission in a manner that precludes the licensee from adequately presenting the basis of his attack. In the alternative, the licensee may be compelled to refrain from Editorializing until it is too late to accomplish what the community interest requires. At the very least, promulgation of fixed Rules and Standards can only serve to dissuade licensees, at the risk of penalty, from effectively serving the public interest and discharging the responsibilities as a broadcast licensee.

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In summary, if licensees are deemed to have Editorial responsibilities, then licensees must be given broad leeway in the discharge of such a responsibility. The promulgation of fixed Standards and Rules, with attendant punitive devices, is a contradiction of the freedom necessary to the effective implementation of the responsibilities of a licensee.

Respectfully submitted,

CARROLL M. BARRINGER

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
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600 Madison Building
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118 **Comments of Cape Fear Telecasting, Inc.**

Cape Fear Telecasting, Inc., licensee of Television Station WWAY (TV), Wilmington, North Carolina (WWAY), by its attorneys, submits these Comments in opposition to the Commission's above-referenced proposal to amend Part 73 of its Rules relating to Editorializing. In support hereof, the following is shown:

1. The Commission has generally recognized and acknowledged the desirability of retaining a degree of flexibility with regard to matters generally coming under the purview of the fairness doctrine. WWAY believes this a necessity in view of the practical impossibility of making *a priori* determinations as to "what" constitutes fairness; unfairness; controversy; or an "attack". As in so many matters which involve questions of freedom of speech,
119 these are not concepts which readily lend themselves to narrow categorization or codification in a set of Rules.

2. In its *Public Notice* released July 6, 1964, dealing with the Fairness Doctrine,[1] the Commission stated that:

> "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee . . . but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'Equal Opportunities' requirement".

The Commission also went on to state:

> "In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation

[1] 2 RR, 2d 1901, 1904 (1964).

in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made."[2]

In its Report on Editorializing By Broadcast Licensees,[3] at Paragraph 10, the Commission also stated:

120 "It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered . . .".

3. It is believed that the Commission has, therefore, itself acknowledged the subject matter of its proposal to be so ephemeral as to be an improper subject for the establishment of rigid and fixed standards. Thus, it would likewise be both impractical and inordinately burdensome to impose upon licensees, where the applicability of such standards is so contingent upon uncertainty, the threat of violation. If there is to be a fairness doctrine, then its administration can best be handled on an *ad hoc* basis. There already exists, of course, a body of case law and Commission rulings. If the Commission would then promptly extend further interpretive rulings upon the request of licensees, this would afford a much more feasible alternative. The role of the Commission in this area should be administratively helpful rather than judicially punitive.

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[2] *Ibid.*

[3] 13 FCC 1246 (1949).

121 4. Moreover, to promulgate fixed rules in this area, with their attendant penalties for failure to comply, would be to encourage pusillanimity on the part of broadcast licensees. The natural tendency on the part of most broadcasters would be to "play it safe" and not endanger their licenses or finances by broadcasting matters of a controversial nature. It would create a deleterious effect with respect to those few crusading radio and television journalists, who, in the exposure of graft or corruption in a community, would run the risk of violating the personal attack doctrine even though exposing the "corrupt" official. In short, the proposed Rules, while designed to "enforce" responsibility, would have the actual effect of "discouraging" licensee responsibility. This is hardly consistent with the public interest standard.

Respectfully submitted,

CAPE FEAR TELECASTING, INC.

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
& PUTBRESE

123 Comments of

Bedford Broadcasting Corporation (WBIW), Bedford, Indiana

Central Broadcasting Corporation (WKBV-AM-FM), Richmond, Indiana

Continental Broadcasting Corporation (WHOA), Hato Rey, Puerto Rico

The Evening News Association (WWJ-AM-FM-TV), Detroit, Michigan

Marion Radio Corporation (WBAT), Marion, Indiana

Moline Television Corporation (WQAD-TV), Moline, Illinois

Radio Television News Directors Association

Reams Broadcasting Corporation (WCWA-AM-FM), Toledo, Ohio

RKO General, Inc. (WOR-AM-FM-TV), New York, New York; (WHBQ-AM-TV), Memphis, Tennessee; (KHJ-AM-FM-TV), Los Angeles, California; (WNAC-AM-TV, WRKO-FM), Boston, Massachusetts; (WGMS-AM), Bethesda, Maryland; (WGMS-FM), Washington, D.C.; (KFRC-AM-FM), San Francisco, California

Royal Street Corporation (WDSU-AM-FM-TV), New Orleans, Louisiana

Roywood Corporation (WALA-TV), Mobile, Alabama

Time-Life Broadcast, Inc. (KLZ-AM-FM-TV), Denver, Colorado; (WFBM-AM-FM-TV), Indianapolis, Indiana; (WOOD-AM-FM-TV), Grand Rapids, Michigan; (KOGO-AM-FM-TV), San Diego, California; (KERO-TV), Bakersfield, California

WKY Television System, Inc. (WKY-AM-TV), Oklahoma City, Oklahoma; (WTVT), Tampa, Florida; (KTVT), Fort Worth, Texas; (KHTV), Houston, Texas; (WVTV), Milwaukee, Wisconsin

• • •

The Commission in the instant proceeding proposes to adopt as a formal regulation two phases of its "fairness doctrine." Proposed Section 73.123(a), which relates to personal attacks on an "identified person or group" in the course of "the presentation of views on a controversial issue of public importance," contains specific directions requiring the licensee to notify the "person or group attacked" and to offer "a reasonable opportunity to respond over the licensee's facilities." Similarly, proposed Section 73.123(c), which deals with editorials by a licensee endorsing or opposing a political candidate, provides for the notification (including transmittal of the tape or script) of the opposing candidate or candidates within 24 hours and requires the licensee to offer "a reasonable opportunity for a candidate or a spokesman for the candidate to respond over the licensee's facilities." The notice accompanying the proposed rules makes clear that they are based upon the Commission's overall "fairness doctrine" as to
131 "controversial issues of public importance" and further cites as statutory authority for adoption of the rules Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

While perhaps more direct than heretofore, the two instant proposals constitute further evidence of a Commission purpose to interfere with the exercise of the journalistic and editorial function of the electronic press. The "fairness doctrine," which the proposed rules are intended to supplement, has long been an instrument of Commission regulation which has impinged upon the free exercise of the journalistic function by broadcasters. Likewise, the remaining requirements of Section 315 have long compelled the broadcast industry to operate in a manner abhorrent to the freedoms protected by the First Amendment to the Constitution. Since the Commission has bottomed its asser-

tion of authority and power to adopt the proposed rules upon Section 315 and the "fairness doctrine," it is our purpose herein to challenge the constitutionality of the reliance the Commission has placed thereon as a basis for justifying its dubious intrusions into the constitutionally-protected area of freedom of speech and freedom of the press. Whatever other weaknesses the proposed rules may have, their ultimate validity must rest upon the constitutional validity of the statutory and regulatory concepts upon which the Commission asserts they rest.

We are not so naive or lacking in sophistication as to believe that, however compelling our argument, the Commission will decide that Congress acted unconstitutionally in adopting Section 315 and its amendments or that the Court of Appeals has been wrong from *Trinity*[1] to now in endorsing program regulation by the Commission. Our only relief, as a practical matter, in view of the concurrence of the Commission and the Court of Appeals, is in
132 fully and fairly presenting the issue to the Supreme Court. Our presentation, therefore, is not a futile exercise in dialectics but a serious attempt to lay the foundation for determination by that supreme tribunal. We expect only that the Commission will sharpen the issue by candidly and thoroughly treating with the questions we present. We are aware that the Court of Appeals recently, by way of dicta, impliedly endorsed the "fairness doctrine" as "a sine qua non of every licensee."[2] It is our fervent goal to re-establish the freedom of the electronic press protected by the First Amendment as the "sine qua non" of broadcast regulation.

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[1] *Trinity Methodist Church, South* v. *FRC*, 61 App. D.C. 311, 62 F. 2d 850 (1932), *cert. denied*, 288 U.S. 599 (1933).

[2] *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001, 2017 (D.C. Cir. 1966).

I.

Preliminary Considerations

A. Broadcasting Is Entitled to the Same Constitutional Protection Afforded Other Communications Instruments Making Up the Constitutionally-Protected Press.

The fairness doctrine policies and the equal opportunity provisions of Section 315 were developed and adopted by Congress and the Commission at a time when conventional wisdom doubted that radio and television were entitled to the protection of the First Amendment of the Constitution guaranteeing freedom of speech and of the press. The equal opportunity requirements of Section 315 have been part of the law, in one form or another, since the Radio Act of 1927. The fairness doctrine had a somewhat ambiguous *ad hoc* origin during the early 30's and was first set forth as a definitive policy by the Commission in dicta in the *Mayflower* decision in 1940.[3]

The doubts of the 20's and 30's about the inclusion
133 of electronic media in the term "press" were eliminated in the 40's and 50's. The premise that radio and television are excluded can no longer serve as justification for the type of government abridgement reflected by the fairness doctrine and the equal opportunity provisions of Section 315. Thus, the Supreme Court has made clear that radio and television, as well as other instruments of communication that inventive genius may bring into being, are entitled to the protection of the First Amendment to the Constitution guaranteeing freedom of speech and of the press.[4] In short, the "press" in its historic con-

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[3] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[4] *Estes* v. *Texas*, 381 U.S. 532, 540, 585, 589, 604, 615 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). See *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954). Compare FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901 (1960).

notation comprehends every sort of communication instrument which affords a vehicle of information and opinion.[5] Thus, broadcasting as part of the press in the constitutional context is entitled, without qualification or exception, to the same protection afforded to all other communication instruments making up the "press" protected by the Constitution. Any impingement upon broadcasting's constitutional rights and privileges can be no greater than the permissible constitutional impingements which may be applicable to all other communication instruments embraced by the Constitntion. The shibboleth that "radio and television are different" no longer can serve as a password for government intrusion.

We need not further belabor this point, since the Commission, in its program policy statement,[6] even
134 though ignoring or unaware it was acting to the contrary, nevertheless, recognized the applicability of the First Amendment to broadcasting, when it stated:

> "[W]e are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise." 20 R.R. at 1907.

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[5] *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). The fact that broadcasting devotes itself to disseminating entertainment as well as information and opinion is not grounds for withholding First Amendment protection from it—"What is one man's amusement, teaches another's doctrine." *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

[6] FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1905-07 (1960).

B. The Fairness Doctrine and the "Equal Opportunity" Provision of Section 315 Have Resulted in Less, Not More, Broadcasting of Information in the Public Interest.

Being both communicators and citizens in a free and open society, we can easily and most heartedly endorse the need of a democratic society for an informed electorate. The issue here is not that goal, but the means of getting there. Experience has demonstrated that the means which the Commission and Congress have selected to reach this goal —the fairness doctrine and the political candidate equality requirements of Section 315—reflect presumptions that offend reality. The application of these manufactured restraints upon broadcasting has neither increased the broadcast of diversity of opinion nor expanded free speech, but, rather, has compelled suppression and blackout. These restraints promote pusillanimity and weakness of voice among a host of competent contributors—the electronic press.

For example, it is widely recognized that the four classic Kennedy-Nixon debates during the 1960 campaign for President could not have been held in the absence of congressional suspension of the equal opportunity requirements for presidential candidates. In the absence of such suspension, in order to hold these four one-hour debates, the networks and stations could have been subjected to governmentally-supported demands for equal time, aggregating as much as 56 hours of additional free time under the equal opportunity provisions, from fourteen other presidential candidates. Presently, the "trade-off" with government to carry four hours is the elimination of 52 hours of other communications in order to make way for the government-dictated program.

Prior to and since the temporary suspension of the Section 315 requirement for presidential candidates in 1960,

networks and broadcasters simply have not offered free time to major presidential candidates for discussion and debate because of the knowledge that, if they did so, they would be inundated with requests by insignificant splinter parties and groups. Thus, the law completely discourages broadcasters from asking major candidates to engage in free debate and discussion, since it requires them to grant equal time to candidates whose interest to the public is not more than the smatter of votes that they receive at the polls.[7]

Section 315 restrictions also serve to deprive broadcasters of the ability to expose candidates to the public on the local and state level by offering free time for debate and discussion. All of the parties to these comments have experienced situations, such as where there were sixteen candidates for governor, eleven candidates for mayor, ten candidates in a congressional primary, etc., which by sheer arithmetical weight made it impossible for them to offer free time for meaningful debate and discussion. If we multiply the volume which might be involved in an election for a single office by the number of offices which might be involved in a single election ranging from state to federal, broadcasters have no freedom whatsoever to treat major parties, offices and candidates with the extensive attention the electronic press believes they deserve. The same restriction applies even where time is sold rather than donated by the
136 broadcast licensee. Here again the sheer number of competing candidates often requires the station to refuse to carry any message by political candidates for a particular office even though the political candidates are willing to pay for the time, since meaningful equal time could not be made available to ten or twenty other candidates for the same office. The net result is that the public

[7] For example, in 1956 the presidential candidate of the American Party received 483 votes and the presidential candidate of the Christian Nationalist Party is reported to have received only eight votes.

often receives no information whatsoever from the broadcast media concerning the candidates for particular public offices, as contrasted to the substantial political discussion which could be made available by the broadcaster if he were permitted to exercise the free journalistic judgment accorded by the Constitution to the "press."

The Commission's vacillating approach toward a broadcaster's right to editorialize and his situation as a Commission licensee have served to restrict, inhibit and frustrate the exercise of freedom of speech in this area. Prior to the Commission's decision in the *Mayflower* case[8] broadcasters had been free to editorialize. In the *Mayflower* decision the Commission flatly forbade broadcast editorialization, and this prohibition remained in effect until 1949, when the Commission, quite begrudgingly, decided to permit editorialization so long as it comported with the fairness doctrine.[9] Since then the Commission has sought to encourage editorialization by licensees, and, in its 1960 Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry,[10] it elevated editorialization by licensees to one of "the major elements [of broadcast performance] usually necessary to meet the public interest, needs and desires . . . ."[11] If there are no constitutional limitations upon its discretion, there is nothing to prevent the
137 Commission from returning to the flat prohibition on editorialization which it previously applied.

The confusion arising from the Commission's action in forbidding or greatly qualifying a broadcaster's right to editorialize has undoubtedly had an effect upon the exercise

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[8] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[9] FCC Report, Editorializing By Broadcast Licensees (hereinafter "FCC Editorializing Report"), 25 R.R. 1901 (1949).

[10] 20 R.R. 1901 (1960).

[11] *Id.* at 1913.

of this right by broadcasters. While we do not pretend to know all the causes, approximately 40% of AM stations, about 55% of TV stations and 70% of FM stations in 1965 did not editorialize. Many have exercised "self-censorship" by remaining silent in the area of editorial opinion because they are not certain of the burdens and hazards. Nor have the fairness doctrine concepts which the Commission has applied to the right to editorialize been conducive to free editorialization by broadcast licensees. In substance, the Commission has conditioned each individual broadcaster's right to editorially speak what is on his mind and conscience with a requirement that the broadcaster also give equal exposure to contrary ideas which may be abhorrent to the mind and conscience of the broadcaster. Thus, the Commission has invaded the sphere of intellect and spirit by compelling broadcasters to publish what is not in their minds[12] and to broadcast matters which their "reason" tells them should not be published.[13] On occasion some broadcasters find that broadcasting views contrary to their own mind and conscience is too high a price to pay for the right to editorialize, and, therefore, they "self-censor" expressing editorial opinion upon issues on which they may have personal views. The "self-censorship" is not accidental but an apparent purpose of the fairness doctrine.

A similar inhibition follows from the Commission's requirement that any editorial endorsement or opposition to a political candidate must be accompanied with an
138 offer of free time to spokesmen for candidates for the same office to reply to the editorial endorsement or opposition. Any station desiring to oppose a political candidate because he is a Communist, a member of the

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[12] *Cf. West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[13] See *Associated Press* v. *United States*, 326 U.S. 1, 20 n. 18 (1945).

American Nazi Party, a member of the Ku Klux Klan or other radical extreme racist or economic group will naturally think twice before attacking such a candidate if, as a condition, he must give spokesmen for such groups the right to express views which are contrary to the mind and conscience of the broadcaster. A broadcaster will often determine that it would be an imposition on the public to force upon it a vicious racial and religious diatribe by a candidate such as George Rockwell of the American Nazi Party as part of the price of a voluntary editorial opposition to his political candidacy. Further, by the calculus of chance, the reply of the spokesman might benefit the candidate the broadcaster opposes in some cases more than the broadcaster's editorial endorsement may benefit the candidate he supports. The chances are that this requirement will serve effectively as an absolute prohibition against editorial political endorsement in many cases.

Another inhibiting effect of the fairness doctrine flows from situations where there are so many divergent views on a particular issue that the burden of handling them all makes it impossible for the broadcaster to deal with any particular side because of the fairness doctrine requirements. Thus, parties to these comments have experienced situations where there have been as many as eight or ten sharply divergent viewpoints existing on public issues such as the need for more public college facilities, water problems in the Western states, fluoridation of water, etc. The burden and impossibility of discovering and properly analyzing all of these different views for presentation has sometimes caused the subject to be ignored in its entirety. For example, if a station desired, after considerable research, to support the need for additional public college facilities, it would have to expose as many as seven or eight contrary viewpoints expressed by such parties
139 as low tax groups; spokesmen for private universities; spokesmen for the large university versus the

small college, and vice versa; legislative and educational groups having different educational philosophies; proponents of trade schools versus junior colleges; etc. In balancing the amount of time it would be required to give meaningful exposure to such a volume of divergent viewpoints as against public need for other kinds of programming, the broadcaster may often determine that his editorial viewpoint on public education would result in an imposition upon, rather than a benefit to, the public.

Another restriction of speech flowing from the Commission's fairness doctrine results from the requirement that a broadcast station broadcasting one side of a controversial issue must broadcast other substantial sides of the same issue, since this requirement compels the broadcaster to substitute other sides of the controversial issue for programs which he might determine were more needed by the public.[14] In short, the Commission, in its fairness doctrine, has reached an *a priori* conclusion that the broadcast of all, rather than one side of a particular controversial issue, is more socially desirable and more in the public interest than any other conceivable program that the broadcaster might otherwise broadcast. Thus, in many instances, in order to meet the compulsory mandate of the fairness doctrine, the broadcaster is forced to delete programs desired by the public merely to show the other side or to give an opposing candidate equal time. Because of the time limitations under which a station operates, this results in the program which might otherwise have been broadcast being deleted from the station's program schedule, quite as effectively as if the Commission had ordered such other program not to be broadcast. For a governmental mandate that establishes priority of communications in media limited by hours of the

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[14] A similar result flows from the equal opportunity provisions of Section 315 with reference to equal time for political candidates.

day not only orders the communication of preferred
140 messages but effectively prohibits communication of messages having a lower order of governmental preference.

The so-called "personal attack" requirement which compels a station to send a tape or script and offer time to a person so attacked also serves as an inhibiting factor in determining the amount of free-wheeling opinion and robust debate a broadcaster may be willing to carry.

Broadcasting has reached the point of development where many sponsors are willing to underwrite the broadcast of public affairs programming, thus extending their horizons beyond the historical entertainment and news sponsorship. The Commission has construed the fairness doctrine to require a broadcaster carrying, for the first time, one side of a controversial issue on a sponsored program to carry other sides sustaining if a sponsor cannot be found for such other sides. In short, if the broadcaster carries one side of a controversial issue presented by a sponsor, he may find himself compelled to contribute a like or even greater amount of time to those with opposing viewpoints if they are either unable or unwilling to pay for time to express their opposition. Since *time* is the principal commodity a broadcaster has to sell, this compulsion results in a confiscation of the broadcaster's time by the Commission without compensation. The inhibiting effect that this has upon the broadcaster is readily apparent—few broadcasters desire to sell one hour of time if they are required to throw in a bonus of an additional hour merely to meet the Commission's fairness doctrine. This burden may, in many cases, induce the broadcaster to avoid the meshes of the fairness doctrine by exercising government-coerced "self-censorship" to the extent of avoiding the broadcast, for the first time, of one side of a particular controversial issue even though a sponsor may be willing to pay for such broadcast.

The Commission seems to recognize that the restrictions here discussed necessarily tend to deter broadcast programming in the matters of public affairs, for the Commis-
141 sion has found it necessary in a wide variety of ways to impose upon the broadcaster an obligation to devote time to public affairs as an essential element of his obligation to operate in the public interest.[15] Thus, restrictions beget more restrictions, and there is no end in sight.

To recapitulate, based upon experience,[16] it is the consensus of the parties to these comments that:

(1) The equal opportunity provisions of Section 315 have served to inhibit and restrict broadcasters from offering to the public debates and discussions by major political candidates.

(2) The fairness doctrine requirements that all significant sides of controversial issues must be presented by each individual station have served to inhibit and restrict the broadcast of controversial issues in varying degrees.

(3) The doubts created by the Commission's past actions in the editorialization area, as well as the application of the fairness doctrine concepts to broadcast editorials, have served to restrict and inhibit not only the number of stations which in fact editorialize, but also have served to restrict the number of editorials broadcast by individual stations.

(4) The "personal attack" requirements of the fairness doctrine have served to restrict the uninhibited, ro-

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[15] See FCC Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (hereinafter "FCC 'Fairness Primer' "), 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[16] See Appendix A for a more complete factual discussion of the restrictive and inhibiting effects of the fairness doctrine and the equal opportunity requirements of Section 315.

bust and wide-open debate of controversial issues, since the burdens flowing therefrom—plus the Commission's implicit disapproval of the broadcast of such personal attacks—tend to coerce stations to blunt the edges of sharp debate.

142 (5) The asserted right of Congress and the Commission to interfere in such constitutionally-protected areas as the broadcast publication of controversial issues, editorials and political discussions, has created arbitrary hazards in the form of possible Commission sanctions, resulting in the adoption by broadcasters of a form of government-coerced "self-censorship" which has led to the broadcasting of less, rather than more, information of this type to the public.

(6) Both the equal opportunity provisions of Section 315 and the fairness doctrine have the effect of ordering broadcasters to carry programs preferred by government in place of those preferred by the broadcasters or the public.

II.

The Operational and Legal Environment in Which Broadcasting Functions

We ask indulgence at this juncture for acceptance, *arguendo*, of the views we hold most firm (and which we will further support with documentation and argument) that:

A. There is no established constitutional principle that discretionary legislative or administrative restraints on communications are justified:

1. If the facilities of the medium are scarce, relatively or absolutely; or

2. If the medium is highly effective and widely attended; or

3. If a license from government is required before operations are commenced; or

4. If a license is a privilege rather than a right; or

143 5. If the medium uses the public domain; or

6. If the restraint is after the communication, in the form of a penalty, and not before, in the form of a command; or

7. If the medium is privately-owned and operates for a profit; or

8. If it advocates one point of view and excludes all others.

B. The press (all mass media) is not a stagecoach obligated to carry all ideas ready to travel.

We ask this indulgence because the threshold constitutional principle involved here is most often ambushed by interminable arguments on the foregoing "ifs," all of which are completely sterile as devices to dilute the liberty of the press (all mass media). We wish first to consider whether this threshold constitutional principle can be invoked here to support the constitutionality of the fairness doctrine or Section 315. That principle is: *Such restraints are constitutionally acceptable only if a serious and substantial threat to our social order is imminently present to a high degree—that is, we are faced with a clear and present danger.*

From a review of all the Commission literature which presents (we confess, quite confusingly) the rationale for the fairness doctrine and Section 315, we can extrapolate only one postulate that, if supportable as true, might meet this threshold constitutional standard. The postulate is: The success and viability of our democratic institutions are seriously and immediately threatened because the electorate

is exposed in high degree to one-sided communications on political and social issues, and its judgments, therefore, will fall short of the intelligence that is demanded if our democratic institutions are to survive. To justify the fairness doctrine and Section 315, this postulate *must* be true.

In testing this postulate, it is necessary first to determine the quality and quantity of communications that
144 normally and regularly reach the typical voter. This involves an understanding of the universe of communications that influence the opinions that he forms.

The weight of these influencing communications and their source have been widely studied by our modern social scientists. They tend generally to classify sources as primary, reference and media sources. The primary sources include family, church, school and economic and social environment of the individual. The communications within these primary groups are credited with a high degree of influence. Thus, it is well established that a person's religious faith and political beliefs may be influenced far more by his family background than by any fine-spun media discussion of theological or political principles.

The reference sources include such organizations as labor unions, service clubs, professional and business associations, veterans organizations, political parties and other similar groups. Social scientists have established that the communications within these organizations have a substantial influence in the formation of the opinions of its members. For example, membership in a labor union and its communications will have a significant effect upon a person's opinion of a guaranteed annual wage, and membership in the American Medical Association and its communications will have a substantial influence upon a doctor's views on Medicare.

With the mass and variety of communications that pass within the primary and reference groups, it certainly cannot be assumed that a condition of one-sidedness on the part of the typical voter is threatened, even assuming one-sided mass media. And, when the massive and diversified communications that do in fact reach the typical voter through mass media are considered, it is completely unreasonable to assume that a significant number of adults in the United States are in the circumstance of making political judgments and decisions after having heard only one side of the issue.

145 There are 1,763 daily newspapers in the United States with a total daily circulation of over 60 million.[17] There are approximately 478 weekly periodicals with a total circulation of approximately 105 million.[18] There are also 1,445 monthly periodicals with a total circulation of 185 million.[19] There are 666 general monthly and weekly consumer magazines having a total annual circulation of 4,781,310,000.[20] In 1964 there were 20,540 new books published in the United States covering all categories of human endeavor and covering a wide range of contemporary religious, sociological, economic and political issues.[21] In addition, 7,909 new editions of older works were published during that year.[22] Also, over 36 million college textbooks were sold during the year 1963.[23] There are 13,750 four-wall and drive-in motion picture theaters in

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17 Editor and Publisher International Yearbook, 1965.

18 1965 Statistical Abstract of U.S. 524, No. 730 (1958 figures).

19 *Ibid.*

20 Magazine Advertising Bureau, *The Growth of the Magazine Publishing Industry*, Circulation No. 3 (1964).

21 1965 Statistical Abstract of U.S. 527, No. 734.

22 *Ibid.*

23 *Id.* at 526, No. 733.

the United States which have an average weekly attendance of in excess of 43 million.[24] There were 502 new motion pictures released in the United States during the year 1964.[25] Finally, the public is exposed to a wide variety of information in numerous lecture halls, public parks and streets, and through adult education activities. All of this in addition to 6,347 broadcasting stations.

With the exception of broadcasting, none of the sources of influential communications alluded to above is subject to the equal opportunity or fairness restrictions im-
146 posed upon the broadcaster. Indeed, advocacy—not objectivity—is their typical style. Their combined influence on opinion formation is patently so overpowering that to leave them free of government-imposed standards of equal access to candidates and points of view and yet impose the same on broadcasters is an exercise in gnat-swatting.

From this consideration of the market place of political and social ideas, it is not only clear that no one-sided condition on the part of the electorate can exist but, rather, the certainty is that there is a virtual deluge of diversified, conflicting and antagonistic opinions that flood the electorate. Therefore, there is no serious social evil that imminently threatens our democratic institutions. And this is constitutionally decisive, in our view, because it completely destroys the extrapolated postulate for the restrictions the government seeks to impose upon the broadcaster.

We think there must be agreement that the postulate on the threshold constitutional test discussed above has no support in what really exists.

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[24] Film Yearbook, 1965.

[25] *Ibid.*

Even if we isolated broadcasting from the combined opinion-influencing communication media discussed above, which the Commission does erroneously,[26] there is a total absence of any substantial, serious and imminent threat of unfairness on the part of broadcasters. Even though broadcasters may protest the application of the fairness doctrine by the Commission as a complex and ambiguous *legal* obligation, the concept of fairness was adopted by the broadcast industry out of business prudence as a sound journalistic ethic long before it was made obligatory as a matter of definitive Commission policy. As
147 early as 1929, in an early *ad hoc* application of a fairness concept, the Commission found that "the great majority of broadcasting stations are, the Commission is glad to say, already tacitly recognizing a broader duty than the law imposes upon them"[27] in the broadcast of discussions of issues of importance to the public. In 1939 the National Association of Broadcasters Code included the following industry expression of the doctrine of fairness:

> "As part of their public service, networks and stations shall provide time for the presentation of public questions including those of controversial nature. Such time shall be allotted with due regard to all the other elements of balanced program schedules and to the degree of public interest in the questions to be presented. Broadcasters shall use their best efforts to allot such time with fairness to all elements in a given controversy."

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[26] The Commission has held that the requirements of fairness apply to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved, and a licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine. FCC "Fairness Primer," *supra* note 15, 29 Fed. Reg. at 10418-19, 2 R.R. 2d at 1910-11.

[27] *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32 (1929).

In 1940, when the Commission first set forth the fairness doctrine as a definitive obligation and policy, it merely turned a widespread industry practice into a legal obligation without any explanation as to how such government intrusion could be warranted under the clear and present danger test postulated above.

The Commission has ignored the salient fact that Congress, in leaving the development and operation of broadcasting to private enterprise, had *ipso facto* built in forces serving the cause of fairness far more effective than any conceivable government intrusion—among others, that right conclusions are more likely to be gathered out of a multitude of competing stations than through any kind of authoritative selection. It is the experience of the parties to these comments that any station desiring to achieve widespread community and listener acceptance must gain a reputation for responsibility and maintain a relatively high
148 "credibility quotient." Since listener acceptability may be equated with station profitability, any profit-motivated station under our privately-owned broadcast system will naturally tend to avoid offense to any group, to moderate advocacy and to attempt to gain a reputation for apparent integrity and fairness. Another force working for the cause of fairness and moderation is the competition which exists not only between broadcast stations but also between other competing media. Such competing media are also standing by ready to combat any error of unfairness committed by any broadcaster and, to the extent that they are able to do so, they diminish the community acceptance and hence the profits of the station committing such an error. Another force compelling the broadcast of varying sides of controversial issues is that "controversy" simply happens to be good programming which will arouse and maintain the public's interest and attention in the same manner that "conflict" arouses and maintains interest in drama. In short, under our competitive private enterprise

system of broadcasting, no profit-motivated broadcaster could prosper by sacrificing community and listener acceptance at the altar of "unfairness."[28]

We recognize that the above conclusion will bring forth protests in somewhat the following form: Admitting
149 that the vast majority of broadcasters operate under a high journalistic ethic of fairness and objectivity and that the profit-making motive of the broadcaster carries with it inherent forces of moderation and fairness, what about the bad apples in the barrel? What is to be done about the Dr. Shulers[29] who use their stations to make defamatory attacks and to engage in anti-Catholic and anti-Semitic tirades? What about the Southern broadcast station which broadcasts nothing but segregationist viewpoints? Or what about the station

[28] Strangely enough, broadcasters are far more often criticized for being bland, inoffensive, innocuous and unwilling to take a strong stand in the broadcast of public affairs programming than of being unfair. If such accusations are justified, one thing is certain: namely, that Section 315 and the fairness doctrine have encouraged their development, which leads to the query whether one of the most significant benefits the Commission might bestow upon the ideal of an informed electorate might be the abolishment of the fairness doctrine and the establishment of a constitutionally-approved "hands-off" policy encouraging vigorous, one-sided editorial advocacy by stations on important public issues of the day, unblunted by the moderating influence of the fairness doctrine, with ultimate reliance upon the aggregate of competing stations and other media to fill in the "other sides" with equally vigorous one-sided advocacy. Certainly, this would assure greater unfettered interchange of ideas than is now the case where broadcasters are assigned the hybrid role of moderator and advocate without being able to play either role wholeheartedly because of fear of Commission intervention.

[29] *Trinity Methodist Church, South* v. *FRC*, *supra* note 1. In commenting upon the Shuler decision, a former law school professor stated: "The amazing thing about *Trinity* is that the District of Columbia court decided the case as it did, despite the Supreme Court's holding in *Near* v. *Minnesota* [283 U.S. 697 (1931)], decided within the year. Difficult as it is to distinguish the facts in *Near* from *Trinity*, one cannot deny the different results. The circuit court could have reached correctly its decision only if the first amendment were not applicable to radio." Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719, 758 (1964).

owner who orders his news staff to slant the news so as to favor some viewpoints and public officials and to discredit others? If broadcasting is to operate in the public interest, is it not necessary for the Commission to suppress such excesses and abuse? Fortunately, perhaps, wiser heads and more authoritative voices than ours have answered these emotion-packed questions in a manner which makes them far more rhetorical than one might assume at first blush.

As stated by the Supreme Court in *Cantwell* v. *Connecticut*:[30]

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

150 As Madison had observed:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press."[31]

Despite this, "the Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." It was a "constitutionally chosen means * * * thoughtfully and deliberately selected" by the framers of our Constitution "to improve our society and keep it free."[32]

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[30] 310 U.S. 296, 310 (1940).

[31] Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964).

[32] *Mills* v. *Alabama*, 34 U.S.L. Week 4418, 4419 (U.S. May 23, 1966).

Although it was recognized that abuses and excesses by the press were inevitable, the framers of the Constitution early determined that such abuses and excesses must be brought within the mantle of protection of the First Amendment if the freedoms of expression were to have the "breathing space" that they "need . . . to survive."[33]

It is noteworthy that the framers of our Constitution were not acting out of naivete when they decided to bring abuses and excesses by the press within the mantle of protection provided by the First Amendment. Prior to the adoption of the First Amendment, in the period immediately before and after the Revolution, the American press became increasingly partisan and often scurrilous.[34] The framers of the Constitution, such as Jefferson, Hamilton, Franklin and Madison, were all subjected to scurrilous personal attacks by the press. Furthermore, in this period, which is often referred to as the period of the "party press," most newspapers were either Federalist or
151 Republican in their approach and were devotedly one-sided. The early history of this "new and rather wild journalism"[35] should give pause to those who argue that restrictions may be placed on the press in the name of "fairness." The First Amendment was adopted to prevent restrictions from being placed on newspapers which individually were clearly one-sided and were thought to be legitimately so. The "truth" was left to be found by citizens in a market place composed of *all* opinion sources. Ben Franklin had stated that his newspaper was not a stagecoach, with seats for everyone.[36] It was

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[33] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

[34] The historical background in this paragraph is based on Mott, American Journalism 71-162 (3d ed. 1962).

[35] *Id.* at 143.

[36] *Id.* at 55.

Franklin's point of view that prevailed and not that of the Royal Governor who in 1770 complained of the radical and influential Boston Gazette: "The misfortune is that some seven-eighths of the people read nothing but this infamous paper."[37]

Thus, there were plenty of journalistic abuses and excesses at the time the Constitution was being framed, which prompted a contemporary to observe that "the American press has been abominably gross and defamatory."[38] But this was accepted by the constitutional framers as the price of a press free of government intervention. Madison's Report on the Virginia Resolutions expressed this concept eloquently, when, after referring to the abuses of the press, he went on to say:

> "It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which
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> 152 have been gained by reason and humanity over error and oppression . . . ."[39]

In thoughtfully and deliberately selecting the press to improve our society, the founding fathers decided, on balance, that the ultimate public interest would be better served by permitting the abuses and excesses of the Shulers and their ilk to exist and even thrive under the mantle of protection of the First Amendment than it would be to permit the

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[37] *Id.* at 75.

[38] *Id.* at 146.

[39] Quoted in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931); see *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

government to prune them away at the danger of injuring the vigor of that part of the press yielding proper fruits. Fearing the occasional tyrannies of government far more than the occasional abuses and excesses by the press, they amended the Constitution so that free speech and press should be guaranteed. Since this ultimate public interest determination was incorporated into the First Amendment, it cannot now be altered by legislative or administrative tampering, no matter how much the Commission may differ with the public interest conclusions on this point embraced by the First Amendment.

III

Discussion of Specific Constitutional Considerations

Up to this point, we have requested the reader to accept, *arguendo*, certain constitutional principles[40] without further support or documentation. Among these is what we have designated as the threshold constitutional standard which we contend must be met to support the constitutionality of the fairness doctrine and Section 315; namely, that such restraints are constitutionally justifiable
153 only if a serious and substantial threat to our social order is imminent to a high degree—that is, we are faced with a clear and present danger. We have previously shown that, as a matter of fact, no clear and present danger of an extremely serious substantive evil exists justifying this type of government interference. The "evils" upon which the Commission apparently relies are highly speculative in terms of both imminence and seriousness. As we have further shown, there is not even a significant history of evils from which the Commission may draw support. At this point we will discuss and document our contention that the "clear and present danger" standard is a mini-

[40] See generally Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719 (1964).

mum compulsion of the First Amendment which must be met before the Commission or Congress may justify the interference with speech and press manifested by Section 315 and the fairness doctrine.

A. The Clear and Present Danger Doctrine

The Supreme Court has generally recognized that the freedom guaranteed by the First Amendment is subject to some limitation, such as where speech is uttered "in such circumstances or of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the powers of government to prevent.[41] However, in holding that the protection of the First Amendment is not absolutely unlimited, the Court has emphasized that "the limitation has been recognized only in exceptional cases."[42]

In *Bridges* v. *California*, 314 U.S. 252 (1941), the Supreme Court described the clear and present danger doctrine as

"a working principle that the substantive evil must
154 be extremely serious and the degree of imminence extremely high" before government interference will be warranted.[43] Justice Rutledge's classic exposition of the clear and present danger doctrine in *Thomas* v. *Collins*[44] also warrants repetition:

"The case confronts us again with the duty our system places on this Court to say where the indi-

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41 *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); see *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Bridges* v. *California*, 314 U.S. 252 (1941); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

42 *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931).

43 314 U.S. at 263. The Court also emphasized that the clear and present danger doctrine does not "purport to mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Ibid.*

44 323 U.S. 516, 529-30 (1945).

vidual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

155 We challenge that anyone, on the basis of fact and logic, could rationally conclude that the success and viability of our democratic institutions are seriously and immediately threatened because the electorate is deprived of balanced and multi-sided information on political and social issues to a degree which would warrant the dubious intrusions of government through Section 315 and the fairness doctrine. It is sophistry to pretend that any dangers

the Commission may perceive as grounds for application of the fairness doctrine are other than doubtful, remote and highly speculative in terms of either imminence or seriousness. Plainly, neither the fairness doctrine nor the equal opportunity provisions of Section 315 can be reconciled with the clear and present danger doctrine which stands at the threshold as a minimum compulsion of the First Amendment preventing otherwise dubious intrusions by government into the field of communications.

The Supreme Court's recent decision in *Mills* v. *Alabama*[45] unconditionally condemned a "fairness" concept as a "reasonable" justification for impinging upon the First Amendment. In short, the Court implied that an abstract need for fairness did not meet the clear and present danger test. Thus, the state had defended a statute outlawing editorials on the grounds that it promoted fairness by avoiding confusing last-minute charges and countercharges which could not be answered until after the election was over.[46] Referring to this "fairness" defense, the Supreme Court stated:

> "We hold that no test of reasonableness can save a state law from invalidation as a violation of the First
> 156 Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[47]

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[45] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

[46] The Alabama Supreme Court, in sustaining the statute prohibiting editorials, stated: "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day: when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195-196, 176 So. 2d 884, 890.

[47] 34 U.S.L. Week at 4420.

If a fairness concept would not serve as a rule of reasonableness which could save the Alabama law prohibiting editorials from invalidation as a violation of the First Amendment, as the Supreme Court found, we submit that the Commission's fairness doctrine likewise cannot serve as a justification for invading the freedoms of speech and press protected by the First Amendment, since the Court has held that "no test of reasonableness" can save a law resulting in such an invasion.

The *Mills* decision contained other far-reaching implications involving the Commission's regulatory approach toward station editorialization and its application of the fairness doctrine. At the outset, we believe that the *Mills* decision cannot be reconciled with the Commission's action in the *Mayflower* case, which led to a nine-year flat prohibition of editorialization. Further, even when the Commission did permit stations to editorialize, in its report on editorialization in 1949, it refused to acknowledge the unconstitutionality of the *Mayflower* prohibition, but rather permitted editorialization under its construction of the fairness doctrine.[48] Thus, the Commission tacitly reserved the right to reinstate the flat prohibition of the *Mayflower* decision if it found it in the public interest to do so. The Commission's continued assertion of power over editorialization stands as a threat to silence broadcast editorials at the whim and caprice of the Commission, absent any admitted constitutional restraint. The exercise of such power over editorials may not be reconciled with the conclusion of the *Mills* decision that "suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution

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[48] See Editorializing Report, 25 R.R. 1901, 1914 (dissenting opinion of Commissioner Jones).

thoughtfully and deliberately selected to improve our society and keep it free. * * * It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."[49]

At this point we will turn to the discursions that so often have aborted attempts to face up to the clear and present danger doctrine. However unavailing they are, it seems that they must be dealt with.

B. Rationalizations Attempting To Circumvent the Application of First Amendment Protections to Broadcasting Are Specious

Whenever broadcasters contend that they are entitled to the same constitutional protection as any other media making up the constitutionally-protected press, exponents of government interference respond that broadcasting is "different" and that the protections of the First Amendment do not easily translate into the environment of the broadcast media. The "differences" usually offered are that there is a physical limitation on broadcast facilities, that broadcasters must be licensed, that broadcasting is a privilege, that the public owns the airways, and a host of other sophistries. As we shall demonstrate, these contentions that the First Amendment's protection of broadcasting is "different" than its protection of other media of mass communications are without merit.

1. The "Scarcity" Argument

One of the principal grounds advanced to prove the thesis that radio and television are "different" is that the limited spectrum space leads to physical limitations which warrant a different application of the First Amendment protections to the field of broadcasting than to other mass

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[49] 34 U.S.L. Week at 4419.

media. The *physical* limitation of the radio and
158 television spectrum is often contrasted to the potentially infinite number of newspapers and magazines as grounds for different treatment under the First Amendment. This is sophistry for two reasons.

In the first place, with many cities having only one daily newspaper and thousands of others having none, it is generally conceded that there is a shortage of daily newspapers in the United States. Today there are three times as many radio and television stations (6,347) as there are daily newspapers (1,763). If scarcity is justification for setting aside the protections of the First Amendment, it would thus necessarily limit the First Amendment's applicability to newspapers even more than in the case of broadcasting stations. However, no one has had the temerity to suggest that newspapers have lost any of their rights under the First Amendment because of the recently experienced and accelerating shortage of newspapers.[50]

In the second place, the Commission has allocated over 1800 UHF and VHF television channels to approximately 1200 communities. However, there are only 718 commercial and educational stations on the air. Under these circumstances, it is difficult to conclude that the shortage of spectrum space has acted as any real brake upon the expansion of television stations. The real limitation on the expansion of radio and television has been economic rather than physical, as the Commission has often recognized. Aside from this, the physical limitation becomes even more of an abstract irrelevancy when the fact is considered that there are three times as many radio and television stations as there are daily newspapers. As one commentator noted

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[50] If it becomes economically viable, as it is already technically feasible, to distribute newspapers by facsimile, it is difficult to assume that the Commission would utilize the scarcity argument to justify interference with such facsimile distribution to the extent that it has applied the argument to broadcasting.

in this regard, "Even if we were to give some constitutional respectability to the numbers game, and limit ourselves to comparing daily newspapers to television stations, we rapidly face the fact that even today each metropolitan area generally has more television stations than newspapers."[51] After making a thorough analysis of the inadequacies of the scarcity argument, he summarized his conclusions on this issue as follows:

> "At any event, all mass media are limited and the limitations are essentially economic; no discussion can alter that fact. If limitation, for whatever reason, can limit freedom, then freedom must be limited for all mass media. In short, to the argument that radio and television are different, one might ask: Different from what? How different? Is the difference significant? Until a better argument than the totally irrelevant physical limitation factor is offered, we suggest that freedom is too important to be sacrificed because of an ancient myth. The fable of 'difference' ought to be immediately reviewed and classified for what it is."[52]

We submit that this thesis is irrefutable.

2. The "Powerful Voice" Argument

Lurking behind the scarcity argument is the sentiment sometimes expressed that broadcasting is such a powerful voice that to permit it to operate under the full protections of the First Amendment would place broadcasters in a position to unduly influence public opinion.

In the first place, the more than six thousand broadcast stations are not "a powerful voice" because they do not speak as one voice. Diversity of ownership effectively precludes any such uniformity since the thousands of

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[51] *Sullivan, op. cit. supra,* note 40, at 759.

[52] *Id.* at 761.

broadcast station owners represent a wide cross-
160 section of political, regional, religious, economic and social beliefs. These stations compete with each other and with a flood of other media.

In the second place, it would be a philosophical anomaly to hold that full and free discussion and exposition of ideas and issues can be achieved by confining the liberty to speak to the weak while limiting, conditioning or silencing the strong. It does not tax reality to suggest that uniformly the most powerful voice that speaks on such issues is government itself. It was one of the purposes of the First Amendment to provide a counter to the power of government. As Justices Douglas, Warren and Black stated in reaching (as the majority did not) the constitutional issue presented by the Corrupt Practices Act:

> "Some may think that one group or another should not express its views in an election *because it is too powerful,* because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. * * * First Amendment rights are part of the heritage of all persons and groups in this country.[53]

Justices Douglas and Black further stated in a movie censorship case:

> "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. * * * Which medium will give the most excitement and have

[53] *United States* v. *International Union,* 352 U.S. 567, 597 (1957) (dissenting opinion) (emphasis added).

the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case."[54]

161 It would be anomalous, indeed, to conclude that, because broadcasting may be a highly or "more" effective means of communication, its effectiveness *per se* could be used as grounds for depriving it of First Amendment protections.[55]

3. The "Licensing" Argument

One of the more specious reasons—bootstrap in nature—offered for limiting or not even applying the First Amendment to radio and television is that these communications media, as a physical imperative, must be licensed under the public interest standard and that this necessity, in some way, supersedes or qualifies the safeguards of the First Amendment. While the Supreme Court in the *NBC* case[56] indicated that an unsuccessful applicant for a license was not, by this circumstance alone, deprived of his rights under the First Amendment, it is an over-extension of this obvious conclusion to further conclude that if a license is granted the licensee thereby and thereupon forfeits the protections of the First Amendment. Such a view would construe the commerce clause as vesting in Congress the

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[54] *Superior Films* v. *Dept. of Education*, 346 U.S. 587 (1954) (concurring opinion).

[55] Aside from the fact that Congress, by virtue of its power over commerce, was a midwife at the birth of broadcasting and thereafter its taskmaster, one may assume that broadcasting's effectiveness, as much as anything else, led Congress to forcing the equal opportunity provisions of Section 315 upon the broadcast industry even though we assume the Commission does not seriously believe that newspapers could be forced to give equal space in their pages to opposing candidates. It is apparent, however, that if the First Amendment permits such compulsion to be applied to broadcasters, it could with like legality be applied to newspapers and other communication media, unless there are "grandfather rights" under the First Amendment.

[56] *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

power to nullify the First Amendment. Realizing that censorship dangers inhere in the exercise of legislative or administrative licensing powers, the Supreme Court has made it quite clear that it will exercise extraordinary vigilance over any licensor in order to make certain
162 that he does not exercise the licensing function in a manner which will violate the free speech and press guarantees of the First Amendment.[57]

A related argument is sometimes advanced that a license is a "privilege" and not a "right"[58] and that this in some manner deprives the licensee of his First Amendment rights. Implicit in this argument is the corollary assumption that "unconstitutional conditions" may be imposed on the grant or retention of a privilege. However, it is firmly established that the government may not condition the grant of privileges upon the relinquishment of constitutional rights. This proposition was unequivocally stated by the Supreme Court in the case of *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), wherein it was stated, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege." As further stated by the Court in *Hannegan* v. *Esquire*, 327 U.S. 146, 156 (1946): "[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated."

Section 315 conditions the right of a broadcaster to carry a discussion by one political candidate upon his granting

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[57] See *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).

[58] See statement of then Chairman Newton N. Minow in Freedom and Responsibility in Broadcasting 173 (Coons ed. 1961).

all opposing candidates equal time. The Commission's fairness doctrine and editorial policy condition the right of a broadcaster to present one side of a controversial issue upon his presenting all other significant sides of the same issue. That such a condition upon communications denies liberty is beyond doubt. As stated in *Near* v. *Minnesota*:[60]

163

> "[I]t does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions [defamation]. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made."

In short, if a broadcast station has the right, without previous ~~restraint~~, to broadcast one side of an issue, this right cannot be made dependent upon a condition that it broadcast something else, more or less, on the other side. Further, since the Supreme Court's recent decision in *Mills* v. *Alabama*,[61] which struck down as unconstitutional an Alabama statute which, *inter alia*, made it a crime for a newspaper to editorialize in support of a candidate on election day, we do not assume that anyone would seriously argue that a broadcast station does not have the constitutional right to editorialize in support of a political candidate. As indicated by the principle laid down in *Near*, if a broadcast station has the right, without previous restraint or fear of subsequent punishment, to editorially

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[59] *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Hannegan* v. *Esquire*, *supra* note 57; *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Hale, *Unconstitutional Condition and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935).

[60] 283 U.S. 697, 720 (1931).

[61] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

endorse a candidate, this right cannot be conditioned upon or made dependent upon its broadcasting something else, more or less.

4. The "Public Domain" Argument

A further excuse offered for government invasion into the field of broadcast programming is that the "public owns the air waves" and that the broadcasters' use of this public property is, therefore, subject to greater exemptions from the protections of the First Amendment
164 than might otherwise be the case. This excuse has an obvious defect because if the use of the public domain deprives a communications media of a right to be free from government censorship, then what media today can be free? In short, if the use of public property does not distinguish radio and television from other communications media, the assertion adds nothing to justify broadcasting being treated differently.

All communications media use the publicly-owned postal system; all to a greater or lesser extent use public highways, streets, and airways; all do this under government regulation and many pursuant to a license or permit. Thus, few printed media could survive without a permit to use the second-class mails. Streets, parks, and halls in many cities cannot be used for meetings or speeches without permits from city authorities. The fact that newspaper, magazines, and other forms of communications use these publicly-owned facilities has never been grounds for permitting government to interfere with the dissemination of information by these media. Indeed, as the court emphasized in *Hannegan* v. *Esquire*,[62] the fact that public property such as the post office facilities are used for dissemination of information by the press requires extraordinary precautions to assure that the government does not, as a price

[62] 327 U.S. 146 (1946).

of private use of such public facilities, attempt to invade protections of the First Amendment.[63]

The explosions of the electronic age have made our society of complex and private persons and activities so interdependent that the creation of public thoroughfares for private use is a major and imperative undertaking of government, as it always has been to a degree.
165 To say that the liberties of speech and press cannot survive their use of such public thoroughfares is to say that they could exist, if at all, only in the old-fashioned ante-electronic age. But the courts, with great vigilance, have fought to dispel the idea that old-fashionedness or uselessness is any part of the character of the First Amendment. Rather, they emphasize that the First Amendment is capable of adaptation to each new fashion of communication—which must be if all other liberties we prize are to survive:

> "If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of those [First Amendment] principles, we will have lost parts of the foundation of the Constitution." [64]

5. The "Content" Argument

One of the most time-honored excuses offered for Commission intrusion into broadcast programming is that the

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[63] Furthermore, employment in a business in the public domain cannot be conditioned upon adherence to unconstitutional government commands. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (religious oath for notary public); *Wieman* v. *Updegraff*, 344 U.S. 193 (1952) (state employees loyalty oath). *Cf. Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939): streets and parks "have immemorially been held in trust for the use of the public . . . ."

[64] *Rumely* v. *United States*, 90 U.S. App. D.C. 382, 393, 197 F. 2d 166, 177 (1952), *aff'd on other grounds*, 345 U.S. 41 (1953). See also discussion and cases cited in Part I, *supra*.

Commission does not censor, because it only examines and weighs the "overall programming" to determine the good judgment and good faith of the licensee in applying the fairness doctrine, without going into the content of particular programs. It is impossible, however, to conceive how the Commission might determine whether a licensee was living up to its fairness doctrine without looking at the content of the licensee's programs. How otherwise might the Commission determine whether an issue was controversial, whether a balanced multi-sided presentation had been made, or whether a statement constituted a personal attack? The Commission itself, in its Editorializing Report, recognized that it might be "called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues."[65] What evidence will the Commission weigh other than the content of the programs containing the particular public issue? It is difficult to imagine a more strenuous type of censorship over content being exercised than that in which the Commission would indulge if it were to place any broadcaster on trial for violating the fairness doctrine.

166

6. The "Prior Restraint" Argument

Perhaps the most specious of all the arguments advanced to support Commission intrusion into programming is that the First Amendment applies only to "prior restraints" but does not apply to "subsequent punishment." In short, it is argued that, since the Commission does not require broadcasters to submit the content of programs for approval prior to broadcast, but leaves the broadcaster

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[65] 25 R.R. 1901, 1911.

free to broadcast what he may desire, subject only to such subsequent punishment as the Commission may choose to apply if the Commission disagrees with what he has broadcast, there is no "prior restraint" and, hence, no violation of the First Amendment.[66] The fact that the broadcaster may have his license renewal application denied, or be required to face revocation of license proceedings, forfeiture penalties, or cease and desist orders as a subsequent punishment if his programming does not meet Commission standards, whatever they may be, is totally ignored as a source of unconstitutional restraint by those advocating this unique position.

However, it has been clear since *Near* v. *Minnesota,* 283 U.S. 697, 715 (1931), that freedom of speech and press might be " 'rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities
167 might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim. (8th ed.) pp. 885." As the eminent administrative law authority Professor Louis L. Jaffe once pointed out to Chairman Minow during a symposium on freedom in broadcasting, no such distinction between prior restraints and subsequent punishments may be properly made under the First Amendment to the Constitution, since the Supreme Court has abandoned such distinctions.[67]

Thus, the Supreme Court, since *Near* v. *Minnesota,* has ignored this distinction and has tested the validity of government interference by its operation and effect. If the scheme of regulation serves to restrain or inhibit free

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[66] Former Chairman Newton N. Minow has been among others who have advanced this contention. See *Freedom and Responsibility in Broadcasting* 172-74 (Coons ed. 1961).

[67] *Op. cit. supra* note 66, at 172-74.

speech and free press, the scheme is unconstitutional. This is true whether the restraint or inhibition is coerced by government by direct prior restraint or by indirect prior restraint flowing from threat of subsequent punishment. It applies whether the restraint or inhibiting effect is direct or indirect and, indeed, even if such restraining influence is unintended by government.[68]

Applying these constitutional principles to the fairness doctrine, the Commission's editorialization policies and the equal opportunity provisions of Section 315, it is beyond a doubt that the regulatory scheme effects a real and substantial restraint and inhibiting effect upon the exercise of the freedom of the press guaranteed by the First Amendment. The Commission's fairness doctrine and the proposed rules here being considered are clearly "instruments of regulation" and have been accepted by the broadcast industry as such. The present and intended weapons of formal and informal sanctions by the Commission for the purpose of forcing compliance with its "fairness" concepts are clearly coercive. Broadcasters cannot be
168 expected to lightly disregard thinly-veiled threats of denial of their renewal applications, possible revocation proceedings or monetary forfeiture penalties if they do not come around to the Commission's views on fairness. The broadcasters' "self-censorship' 'in the area of controversial and political issues, compelled and defined in scope by Congress and the Commission, is no less virulent because it may be privately administered by broadcasters out of fear and timidity than if the Commission applied flat prohibitions against editorialization and adopted similar compulsions as to what broadcasters may or must broadcast. The Commission's fairness policies and the

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[68] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Smith* v. *California*, 361 U.S. 147 (1959); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

equal opportunity provisions of Section 315 clearly deter broadcasters from selecting all those programs which they desire to broadcast, because of doubt of whether they could prevail in retaining, their license free of sanction if they exercise such freedom of selection or because of fear of the delay and expense of having to undergo lengthy litigation in order to establish their right to do so. In sum, the Commission's fairness doctrine and Section 315 have consistently served to dampen the vigor and limit the variety of electronic-press reporting in a manner which is inconsistent with the First Amendment.

7. The "Private Restraint" Argument

In rationalizing the constitutionality of the fairness doctrine in its Editorializing Report, the Commission stated:

> "The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear *and free alike from similar restraints by private licensees.*"[69]

Through this reference to "similar restraints" by a private licensee, the Commission spuriously attempted to
169 shift the onus of the abridgement of freedoms of the press resulting from its own actions by implying that a private licensee could be guilty of unconstitutional abridgement of speech and the press if the licensee failed to give the public access to all sides of public questions.

Admittedly, one of the paramount interests protected by the First Amendment is the public's access to a free flow of information and ideas. However, the First Amendment protects this paramount interest only from interfer-

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[69] 20 R.R. at 1912 (emphasis added).

ence by governmental action and not from action by private persons. This principle was applied specifically to broadcasting in the *McIntire* case,[70] involving a station's refusal to carry certain sponsored religious programs, wherein the court stated:

> "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant [broadcast station] is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

Thus, the Commission cannot excuse its own invasions and restraints upon the freedoms protected by the First Amendment on the grounds that such invasions are necessary to prevent First Amendment "abridgments" by the private broadcaster. Whatever interests of the public may be protected by the First Amendment, they are only protected from action by government. No court has ever accepted the Commission's implication that the refusal of a licensee to air all sides of a public issue is itself a denial of First Amendment rights to the American people. If this unique concept were accepted, not only broadcasters but all other communications media would be required to present the "other side" as a constitutional condition precedent to taking a public position on any controversial issue or to giving editorial en-

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[70] *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

dorsement or other exposure to any political candidate. The fact is, however, that the press protections of the First Amendment embrace the right of the press to speak unfairly, one-sidedly, even falsely, or not at all. A requirement of fairness is contrary to

> "the theory of our Constitution . . . that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, *unfair*, false, or malicious."[71]

While the press in general certainly has strong moral and ethical obligations to provide fair and objective reporting on information essential to an informed electorate, these moral and ethical obligations have not yet been converted into a *legal* obligation by the First Amendment.[72]

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One final note should be added to this discussion. The Supreme Court has recently encouraged "uninhibited, robust and wide-open" debate on public issues by eliminating the private action against the press for libel, in the absence of actual malice, as an unwarranted obstacle
171 to such debate.[73] It is somewhat incongruous to find that the Commission at the same time is adding new obstacles to "uninhibited, robust and wide-open" de-

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[71] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 298-99 (1964) (concurring opinion of Goldberg, J.) (emphasis added).

[72] As Justices Black, Douglas and Rutledge have noted: "[I]t assumes the impossible" to suppose that mass media, including radio, would at all times be equally fair "as between the candidates and officials they favor and those whom they vigorously oppose." The Justices stated that, for this reason, all media should be equally free so as to combat error in one another. *Kovacs* v. *Cooper*, 336 U.S. 77, 103 (1949) (dissenting opinion).

[73] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

bate by creating a new personal action against the electronic press; namely, the right of a person personally attacked during an uninhibited debate to assert an absolute right to use the station's microphone and time for reply, and the right of a spokesman for an opposing political candidate to assert an absolute right to use the station's microphone and time if the station endorses another political candidate. In the final analysis, if free speech has the function of providing that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vindictive, caustic and sometimes unpleasantly sharp attacks on government and public officials,"[74] how is that function served if, as is the case, broadcasters are often timid in involving themselves and their stations in discussions of controversial issues, editorialization and discussions by political candidates because of regulations designed to promote fairness? If the Supreme Court could find that the constitutional guarantees of the First Amendment required a federal rule denying to public officials[75] a cause of action against the press for libel because of the restraining influence such libel suits may have upon wide-open discussion, the underlying principle would dictate that the Commission should eliminate the burdens of its fairness doctrine.

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[74] *Id.* at 270.

[75] The *New York Times* doctrine may extend to libel actions by other than public officials. See *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 n. 10, 86 n. 12, 88-91 (1966); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 379 U.S. 968 (1965); *Afro-American Publ. Co.* v. *Jaffe*, U.S. App. D.C. No. 18363, decided May 27, 1965 (concurring opinion) (reargued *en banc* Oct. 18, 1965); *Pauling* v. *National Review, Inc.*, 34 U.S.L. Week 2575 (N.Y. Sup. Ct., New York Cty., decided April 21, 1966).

172 IV

EVEN IF A CONSTITUTIONAL POWER TO REQUIRE "FAIRNESS IN BROADCASTING RESIDES IN CONGRESS, THE STATUTORY PROVISIONS UPON WHICH THE COMMISSION RELIES AS AUTHORIZING IT TO PROMULGATE THE FAIRNESS DOCTRINE ARE UNAVAILING BECAUSE THEY ARE VAGUE AND LACK EXPLICITNESS

Thus far it has been contended that both Section 315 and the fairness doctrine are beyond the constitutional power of the Congress and of the Commission. In this section it is further contended that, even if such a power resides in Congress, the statutory provisions upon which the Commission relies as authority for the fairness doctrine are defective on either of two separate grounds: (1) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine fail to meet constitutional requirements of narrowness and preciseness, and thus cannot be used as authority for the Commission to tinker with First Amendment rights; and (2) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine are not sufficiently explicit to establish that Congress *intended* to authorize the Commission to tinker with First Amendment rights.

A. Unconstitutional Vagueness

It is firmly established that a vague statute regulating conduct and touching upon First Amendment rights is unconstitutional. The Commission bases its fairness doctrine upon such vague provisions of the Communications Act. This vagueness, with its implications of sweeping authority in the Commission, inhibits protected speech; it makes possible Commission arbitrariness; and it effectively precludes judicial review.

173 The defects of the statute are demonstrated and compounded by the practice of the Commission under

the fairness doctrine in general, and now through the proposed rule. The vagueness persists; it has produced Commission inconsistencies and arbitrariness (particularly in regard to unpopular but clearly controversial causes); and it is only a rare licensee who thinks it useful to raise a challenge—administrative or judicial—to a ruling by the Commission or its staff.

1. The Statutory Provisions Relied Upon By The Commission Are Too Vague To Permit Commission Impingement Upon First Amendment Rights

The Commission has based its authority for the "fairness doctrine" upon the "public interest, convenience, and necessity" requirements in the Communications Act, and, since 1959, upon that clause of Section 315(a) which recognizes an obligation of the licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." See FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1903 (1964). Neither of the quoted standards is self-defining, and both suffer from the same vice of vagueness which has prompted the Supreme Court to strike down legislation which impinges upon the First Amendment area and vests virtually uncontrolled discretion in administrative officials.[76]

Even if Congress intended the Commission to issue rules and regulations to effectuate the vague Congressional standards, such power cannot constitutionally be bestowed upon administrative officials when First Amendment rights are so intimately involved.

174 "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regu-

[76] *E.G. Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

lated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for more sensitive tools . . . ."[77]

The evils of such a sweeping standard, especially where First Amendment rights are involved, have been cited often by the High Court. Vagueness in a statute or rule bearing on speech causes the speaker to "'steer far wider of the unlawful zone' Speiser v. Randall, 357 U.S. 513, 526 . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). Therefore, statutes restrictive of First Amendment freedoms "must be narrowly drawn to meet the precise evil the legislature seeks to curb," and "the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *United States* v. *C.I.O.*, 335 U.S. 106, 142 (1948) (Rutledge, J., concurring), quoted approvingly in *Baggett* v. *Bullitt*, *supra*, 377 U.S. at 372 n. 10.[78]

A vague statute of the nature here in question not only inhibits legitimate speech, but it provides a cloak for the exercise of arbitrary power by administrative officials. (See cases cited at note 76, *supra*.) "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP* v. *Button*, 371 U.S. 415, 435 (1963). The Commission has *in fact* applied the "vague and broad statute" in a discriminatory manner.

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[77] *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), quoted in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

[78] See also *Ashton* v. *Kentucky*, 34 U.S.L. Week 4398 (U.S. May 16, 1966); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Cantwell* v. *Connecticut*, *supra* note 76; *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

The proposed rule on its face discriminates against "foreign groups or foreign public figures" (§ 73.123(b)). The fairness doctrine as applied discriminates openly against atheists, *Mrs. Madalyn Murray*, 5 R.R. 2d 263 (1965), and communists (and the "communist viewpoint"), FCC "Fairness Primer," 29 Fed. Reg. 10416, 10417-18, 2 R.R. 2d 1901, 1908 (1964). In a dissenting opinion in the *Murray* case, Commissioner Loevinger noted the Commission's application of the fairness doctrine to assure contrasting *religious* viewpoints but not a contrasting *atheistic* viewpoint. He thought that the conflicting cases "suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are involved. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." 5 R.R. 2d at 269. See Appendix B. The Commission is not unlike the censor whose broad authority was held unconstitutional in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952); "[T]he censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."

It is worth noting that the Commission, in a series of events of which the latest is the *Murray* case, has retreated under public pressure from its early ruling informing licensees that they must provide time to spokesmen for atheism, *Robert Harold Scott*, 11 F.C.C. 372, 3 R.R. 259 (1946).[79]

Another example of Commission inconsistency and arbitrariness under the fairness doctrine is the line of rulings on the extent of the licensee's obligation to seek out responsible reply comments. Compare *The Evening News*

[79] See *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 181-88, 200 (1948); *Letter to Edward J. Heffron*, 3 R.R. 264-a (1948); *Robert H. Scott*, 5 R.R. 859 (1949); *Robert H. Scott*, 25 R.R. 349 (1963).

Ass'n., 6 R.R. 283 (1950) (licensee should allow discussion of labor side on public issue and "continue to make available its facilities" for management side); with 176 *Dominican Republic Information Center*, 16 R.R. 431 (1957) (network attempt to obtain other side on *Galindez-Murphy* case prior to broadcast was sufficient, and time need not be made available to the Dominican Republic after the broadcast); and with *Jefferson Standard Broadcasting Co.*, 17 R.R. 339 (1958) (licensee violated requirement of fairness doctrine by not making adequate presentation of other side of "pay-TV" controversy even though it had sought several spokesmen for that side and had kept offer open). These cases, also, suggest that the fairness doctrine might be applied in some proportion to the acceptability of the viewpoints to the Commission.

Moreover, in avoiding a patently unworkable situation, the Commission has apparently been forced to make an arbitrary distinction between types of program formats subject to the "personal attack" principle. It is generally understood that the principle is not intended to apply to a station's regular newscasts, where other persons' newsworthy and controversial charges of crime and corruption are constantly being reported.[80] If the reply time had to be provided in this situation, the station would either be hopelessly burdened from the effort and expense of seeking replies and providing air time for them, or it would have to forego a large part of its journalistic function. Yet, as the Commission reads the statute, Section 315(a) of the Act makes the total fairness doctrine applicable to news-type programming, and this fact places the Commission in a dilemma which casts more doubt on the legality of the fairness doctrine: either the personal attack principle

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[80] Such a distinction may be made in interpreting the vague expression "presentation of views" as used in the phrase "during the presentation of views on a controversial issue of public importance." (§ 73.123(a).) But is not a news report of other persons' views still a "presentation of views"?

makes impossible demands upon the broadcaster, further aggravating the abridgement of First Amendment rights, or by carving out an exception to that principle the Commission violates Section 315 which allegedly requires
177 an across-the-board application of fairness doctrine principles. The personal attack principle itself cannot be so narrowly construed. A news-program exception to the principle is inconsistent with the Commission's own rationale that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . . ." Notice of Proposed Rule Making, p. 1; FCC "Fairness Primer," 29 Fed. Reg. 10416, 10420, 2 R.R. 2d 1901, 1915 (1964); FCC Editorializing Report, 25 R.R. 1901, 1907 (1949). "[T]he licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. The crucial consideration, as the Commission stated in Mapoles, is that, 'his broadcast facilities [have been] used to attack a person or group' (Letter of September 18, 1963 to Douglas A. Anello, FCC 63-850)." FCC "Fairness Primer," *supra*, 29 Fed. Reg. at 10421, 2 R.R. 2d at 1917. *Cf. Lar Daly*, 19 R.R. 1103 (1960). The only way the Commission can legally resolve this dilemma is by renouncing the entire personal attack principle. At the least, the selective enforcement of the principle points up the potential for arbitrariness inherent in the vague authority of the Communications Act.

Another defect in the fairness doctrine is that the overly-broad standards of the Communications Act effectively preclude judicial review in an area where constitutional freedom is in jeopardy. The Commission "is allowed, in essence, to define its own authority, to choose the direction and focus of its activities," because Congress itself has not made these decisions and the courts are powerless to make them. See *Watkins* v. *United States*, 354 U.S. 178, 205-06 (1957); *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.

1957) (both cases: defectively-broad mandates of congressional investigating committees).[81]

178 The statutory standards here involved are "completely lacking in . . . terms susceptible of objective measurement."[82] The phrases "public interest, convenience, and necessity" and "reasonable opportunity for the discussion of conflicting views on issues of public importance," have, to use words of the Supreme Court, "no ascertainable meaning either inherent or historical" (*Thornhill* v. *Alabama*, 310 U.S. 88, 100 (1940) (referring to the phrase "without a just cause or legal excuse")).[83]

Assuming that "fairness" is a constitutionally justifiable purpose in regulating speech in broadcasting, the definition of such terms as "reasonable opportunity," "conflicting views," and "issues of public importance," as well as such a nebulous term as "public interest," cannot be left to the Commission anymore than the definition of a "religious, charitable or philanthropic cause" could be left to the secretary of the Connecticut public welfare council in *Cantwell* v. *Connecticut*, 310 U.S. 296, 301-02 (1940). First Amendment rights are jeopardized where a government official may regulate speech, not as a ministerial function (*id.* at 306), but after "appraisal of facts, the exercise of judgment, and the formation of an opinion" (*id.* at 305).

The Commission may not distinguish its regulatory scheme on the ground that it is only used for the purpose

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[81] The latter case was said to have "constituted an even more serious threat to freedom of thought and expression. For these hearings consisted of the questioning of persons employed in the newspaper field, in radio and television." 154 F. Supp. at 605 (Youngdahl, J.).

[82] *Cramp* v. *Board of Public Instruction*, *supra* note 78, at 286.

[83] Compare *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). (solicitation's "effects upon the general welfare of citizens of the City of Baxley" held to be a statutory test "without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit").

of encouraging speech. The Commission has shown that, in its view, the statute is broad enough to permit the absolute suppression of an extremely vital kind of speech—
editorializing, *Mayflower Broadcasting Corp.*, 8
179 F.C.C. 333 (1940).[84] Moreover, the theory of the cases is that a vague statute in this field is inherently defective because it inhibits speech, thus presumptively defeating any stated purpose to expand speech. See also arguments at pages 5-13, *supra*.

The fact that the Commission continues to struggle clumsily, inconsistently and often arbitrarily with its own implementation of the fairness doctrine is indication enough that the enabling statute is not clear enough to provide a framework within which details can be confidently worked out. The Commission is doing more than applying standards already provided by Congress contrary to the Supreme

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[84] The uncontrolled discretion of the Commission is exemplified by its changing positions on licensee editorializing. After nine years of prohibiting editorializing as being contrary to the public interest, the Commission decided to permit it so long as it comported with fairness doctrine requirements. FCC Editorializing Report, 25 R.R. 1901 (1949). Since then the Commission has sought to *encourage* editorializing. See e.g. FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1913, (1960); *Hearings on Broadcast Editorializing Practices before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 87 (1963) (testimony of FCC chairman E. William Henry); Speech by FCC chairman Newton N. Minow before the National Association of Broadcasters Public Affairs/Editorializing Conference, March 1, 1962, published in Minowa and Laurent, Equal Time 148 (1964). Chairman Henry, apparently not wishing to promote just every kind of editorializing, qualified his endorsement by stating to the subcommittee on Broadcast Editorializing Practices: "We have cautioned, however, that the licensee should not do so [editorialize] if he is not prepared to act fairly and to employ an adequate staff as the foundation for meaningful and intelligent editorialization." *Hearings, supra*. In the future the Commission may wish to judge licensee performance in part on whether the licensee's editorials have been "meaningful and intelligent," ignoring as it has done thus far, the First Amendment implications of its statements and decisions concerning program content. Moreover, the Commission's view would permit it to ban station editorials any time it decides such action is once again in the "public interest."

Court command that "sensitive tools" forged by Congress must be used when administrators tinker with First Amendment rights.

180 The Commission's Proposed Rule and Fairness Doctrine Are Similarly Vague, and, Together With the Threat of Sanctions and the Lack of Effective Judicial Review, Produce an Unconstitutional Prior Restraint on the Licensee's Speech

For the reasons stated above, the purported statutory authorization for the Commission's fairness doctrine is defective and cannot be remedied by the Commission. However, even if the Commission, as the delegate of Congress, could constitutionally cure the vice of vagueness in the statute, it has failed to do so. The proposed rule, like the fairness doctrine in general, is vague and possesses all the actual or threatened evils discussed above.

Accepting *arguendo* the Commission's position that the fairness doctrine has been enacted into Section 315(a) (but see subpart B, *infra*), that section speaks of an obligation to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Commission standard is somewhat different in that it states the requirement as that of "affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance."[85] Thus the Commission reads-in a qualification that the issues covered by the fairness doctrine are those which are "controversial."

What is one man's "controversy" is another man's dogma; what is "reasonable" opportunity to one person is too little and too late (or, too much and requiring re-

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[85] FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1904 (1964). This also is substantially the language used in the Notice of Proposed Rule Making, p. 1.

sponse) to another; what is a "conflicting" or "contrasting" view to one person is substantially the same ideology to another; and what is an "issue of public importance" to one person justifies invocation of a right of privacy in the eyes of another. Thus, of the myriad ideas which are discussed on any given broadcasting station, 181 the licensee will conclude that many clearly fall either within or without the meaning of the fairness doctrine, but that many are open to question on this point. Even assuming that it would be otherwise constitutional for the Commission to control speech in broadcasting by clearly defining these ambiguous terms, it is an impossible task.

The proposed rule, Section 73.123, is a prime example of the futility of the Commission's effort. In codifying the "personal attack" principle it adds more ambiguous words: an opportunity for personal reply must be afforded when an attack is made "during the presentation of views" on that person's "honesty, character, integrity, or like personal qualities." § 73.123(a). It is obvious that there are problems involved in defining what is an "attack" and what is "personal," as well as what constitutes a "presentation of views" (see page 47 *supra*), to say nothing of the vagueness of the terms "honesty, character, integrity or like personal qualities." It is impossible to predict all the situations in which problems of interpretation could arise. And what constitutes an attack upon an "identified . . . group"? Is an attack on "the City Council gang" an attack on each city councilman or on the Council as a group? To whom should time to respond be offered when an attack is made on "the Irish Mafia"? In Section 73.123(b), who are included in the phrase "persons associated with the candidates in the campaign"—a candidate's wife and children? even if the attack is somewhat personal? largely personal?

The Commission recognizes in a variety of language in the Notice that there will be problems of interpreta-
182 tion,[86] but it minimizes the significance of this by stating (1) that the Commission is available for interpretation "in appropriate cases" (Notice, p. 1 n. 1) and (2) that "it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle" (Notice, p. 2).

The first point only emphasizes the vagueness of the standards involved and encourages the broadcaster to avoid governmental "red-tape" and expense on close questions by simply avoiding, if possible, the situations which give rise to those questions, or by following uncritically the informal advice of the Commission staff. This also emphasizes the wide range of control over program content left to *ad hoc* agency determination, thereby placing the Commission in the role of censor and effectively giving it the final word on what views are to be expressed, how they are to be expressed and by whom they are to be expressed. The danger of this governmental power is heightened by the practical necessity of the broadcaster to act upon FCC *staff* advice.

The second point (assuming, as we need not, the *Commission's* good faith)[87] actually increases the ambiguity in

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[86] *E.g.*, "We have used the phrase 'reasonable opportunity' here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable [?] opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response." Notice, p. 4.

[87] "[E]xperience teaches us that prosecutors too are human." *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961). "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

the applicability of sanctions under the fairness doctrine. Not only must the licensee determine the meaning of such terms as "controversial" and "issues of public importance," but it must also guess at the manner in which the Commission will enforce them as a matter of "good
183 faith."[88] The "good faith" test is also inconsistent with the first point above, which as a practical matter compels licensee adherence to informal staff advice even if the licensee in "good faith" disagrees.

Such a regime of regulation violates due process of law and the First Amendment. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Even when acting in "good faith," the licensee is compelled to make a usually impossible distinction between when he is absolutely sure that there has been no personal attack and when he "recognizes that there may be some dispute concerning this conclusion"; in the latter case the licensee "should" take steps to preserve a record of the broadcast in question "for a reasonable period of time" (Notice, p. 2 n. 2). These vague requirements will further discourage the station from broadcasting "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The Commission's record of past inconsistent and arbitrary rulings (see pages 45-48, 49 n. 84, *supra*) leads to greater licensee inhibitions on still unsettled questions, especially where unpopular causes may be seeking exposure.

Assuming *arguendo* that judicial review could be effective in curbing Commission abuses in this area (but see pages 48-49, *supra*), the licensee's "stake" in any one

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[88] The Commission states that it will act against a licensee only where "there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist" (Notice, p. 2). Quaere as to *whose* reasonable doubt. Quaere also as to whether a statement correctly reciting a person's conviction for embezzlement or for violation of the Smith Act would raise at least a "reasonable doubt" as to the applicability of the fairness doctrine.

statement, program, or issue probably would be "insufficient to warrant a protracted and onerous course of litigation."[89] In many situations, such as elections, the delay required for formal Commission consideration and court review would effectively moot the problem. See (1) *Republican National Committee*, 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC*, U.S. App. D.C. No. 18936 (Oct. 27, 1964), *cert. denied*, 379 U.S. 893 (1964) (Goldberg and Black, JJ., dissenting); *Republican National Committee*, 3 R.R. 2d 767 (1964) ("equal opportunities" provision and "fairness doctrine" in-
184 voked; final Commission decision one day before election day); (2) *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F. 2d 83 (7th Cir. 1962) ("equal opportunities" ordered by Commission five days before election day; petition for reconsideration denied four months later); (3) *Columbia Broadcasting System*, 14 R.R. 720 (1956) (Commission refused to hold that "equal opportunities" provision was not applicable until one day before the election).

The lack of clear standards, the potential and actual arbitrariness of the Commission, and the general absence of judicial review, impose upon the broadcast licensee a burden of "self-censorship" condemned by the Supreme Court. See *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 279; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The self-censorship resorted to in order to provide programming in conformity with the Commission's known views (or to eliminate programming which raises a question not immediately answerable by the Commission) is enforced by the threat of fines under the forfeiture provision of the Act;[90] and of license revocation[91] or denial of re-

[89] *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965).

[90] 47 U.S.C. § 502.

[91] 47 U.S.C. § 312(a).

newal;[92] as well as by the threat of such a classic prior restraint as a cease and desist order.[93] The Commission states in its Notice of Proposed Rule Making that one of its purposes is "to assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed" (Notice, p. 2), a clear reference to above-mentioned sanctions. The proposed rule would add the raised fist to the lifted eyebrow in the arsenal of weapons used by the Commission to regulate speech on the airwaves through the fairness doctrine.

This scheme of regulation, combining as it does uncontrolled Commission discretion and Commission
185 threats of possibly catastrophic economic loss, is a "prior administrative restraint" far more direct and coercive than that struck down in the *Bantam Books* case, where the threatening agency did not itself control the sanctions. Any such prior restraint on speech bears "a heavy presumption against its constitutional validity."[94]

B. Lack of Explicit Delegation

In addition to the constitutional requirement for narrowness and precision in a statute bearing on First Amendment freedoms, there is an established line of Supreme Court decisions holding that there must be "explicit" authorization for agency action "within the area of questionable constitutionality . . . ." *Greene* v. *McElroy*, 360 U.S. 474, 506 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946); *Ex parte Endo*, 323 U.S. 283 (1944). The congressional authorization will not be inferred from general language or congressional acquiescence. The asserted statutory authorization for the

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[92] 47 U.S.C. § 307(d).

[93] 47 U.S.C. § 312(b).

[94] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

proposed rules is clearly lacking in the required explicitness.[95]

In *Greene* v. *McElroy, supra*, the Supreme Court held that the Defense Department lacked authorization to impose loyalty-security procedures which denied affected persons the right of confrontation and cross-examination. The Department argued that the President had "in general terms" authorized its procedures; that congressional authorization could be "inferred" from general legis-
186 lation concerning the armed services; and that both Congress and the President had acquiesced in the Department's loyalty-security program (360 U.S. 495, 506). The Court, however, rejected the Department's contention (*id.* at 506-07):

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. * * * But this case does not present that situation. We deal here with substantial restraint on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we

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[95] We recognize that the "public interest, convenience and necessity" language of the Act is sufficiently explicit to authorize the Commission to conduct its normal regulatory functions, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), and that the Congress was not required to provide "an itemized catalogue of the specific manifestations of the general problems," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 220 (1943). But when, as here, Commission action enters an "area of questionable constitutionality," only "the most explicit" authorization will suffice. *Greene* v. *McElroy, supra*, 360 U.S. at 506, 508.

> are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. * * * Such decisions cannot be assumed by acquiescence or nonaction. * * * They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In *Kent* v. *Dulles, supra,* as in *Greene,* the Court struck down agency action of doubtful constitutionality due
187 to the absence of explicit legislative authorization. The issue in *Kent* was the Secretary of State's authority to deny passports to applicants who refused to answer questions concerning alleged Communist beliefs and associations. A 1926 statute authorized the Secretary to "grant and issue passports" and "a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." 357 U.S. at 123-24. Nonetheless, the Court stated (*id.* at 129-30):

> "Since we start with an exercise by an American Citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or

withhold it. * * * Its [a passport's] crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. * * * and if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. * * * Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. * * * We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

* * *

"To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs and associations. Congress has made no such provision in explicit terms; and absent one, the Sec-
188 retary may not employ that standard to restrict the citizens' right of free movement."

Hannegan v. *Esquire, supra,* involved First Amendment questions posed by the Postmaster General's denial of a second-class mailing permit to *Esquire* magazine on the ground that it contained material deemed vulgar and risque. He purported to act under a statute which restricted the second-class "privilege" to publications "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" (327 U.S. at 148-49). The Court

held, however, that this statute did not authorize the Postmaster General's action. It stated, in language pertinent to the instant case (*id.* at 155-56):

> "We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. * * * And the Court held in Ex parte Jackson, 96 U.S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene materials through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 421-423, 430-432, 437, 438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition [of the statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."

In short, the Commission, no less than the courts, "must assume, when asked to find implied powers in a grant
189 of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex parte Endo, supra,* 323 U.S. at 300. And Congressional acquiescence in Commission decisions in the area of "fairness" cannot be deemed a substitute for explicit statutory authorization.

The Commission has historically based its fairness doctrine on the "public interest" criterion which governs its

licensing functions under the Act, contending, in substance, that licensees which do not fairly present both sides of controversial public issues do not operate in, or serve, the "public interest." See FCC "Fairness Primer," and appendices thereto, 29 Fed. Reg. 10416, 25 R.R. 1901 (1964). Since 1959, the Commission has also relied upon language added in that year to Section 315(a) as follows:

> "Nothing in the foregoing sentence [exempting bona fide news programs from the 'equal opportunities' requirement of the section] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The proposed rules here are said to be authorized by Section 315, along with those sections (§§ 4(i), 303(r)) authorizing the Commission to adopt rules and regulations "not inconsistent with law" in the performance of its functions under the Act.

The quoted amendment to Section 315, however, does not purport to impose a new "obligation" upon licensees or to delegate new authority to the Commission. Rather, it is phrased in terms of preserving a pre-existing "obligation" against implied repeal by reason of enactment of the "news program" exception to the "equal opportunities"
190 requirement. The Statement of the House Managers in the Conference Report concerning the amendment indicates that the quoted language was intended as a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communica-

tions Act of 1934." H.Rept. No. 1069, 86th Cong., 1st Sess. 5 (1959). See also S. Rept. No. 562, 86th Cong., 1st Sess. 9, 13 (1959). Since the Commission has repeatedly premised its fairness doctrine on the "public interest" criterion of the 1934 Act, and the 1959 amendment by its terms is simply a reaffirmation of an "obligation" presumed to exist under that Act, it is pertinent to consider whether the pre-1959 statutory scheme in fact contains authorization for the fairness doctrine.

Extended discussion is unnecessary, we submit, to conclude that it does not. Under the cited Supreme Court decisions, statutory language authorizing the Commission to grant broadcast licenses upon a finding that the "public interest, convenience, and necessity" will be served falls far short of an "explicit" authorization to direct licensees to adhere to detailed "fairness" requirements in their programs relating to controversial public issues. This conclusion is reinforced by the existence of Section 326, which prohibits censorship by the Commission or interference with "the right of free speech by means of radio communication." And the very specific and narrow language of Section 315, affording "equal opportunities" to "legally qualified candidates," plainly did not authorize the Commission to extend that right to other classes of persons via the fairness doctrine.

Indeed, the legislative history of Section 315 lends credence to the view that Congress, at the time of both the 1927 and 1934 Acts, considered and rejected a "fairness doctrine." Section 315 was taken *in haec verba* from Section 18 of the Radio Act of 1927. The bill reported by the Senate Committee at the time of the 1927 Act contained a provision stating:

191 "If any licensee shall permit a broadcasting station to be used . . . [to broadcast any matter for a valu-

able consideration], or by a candidate or candidates for public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast." (Emphasis added.)[96]

This provision was stricken on the floor of the
192 Senate,[97] and a substitute provision affording "equal opportunities" to "candidates" alone was adopted

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[96] See S. Rept. No. 772, 69th Cong., 1st Sess. 4 (1926); 67 Cong. Rec. 12503 (1926).

[97] At the time the amendment changing this section was proffered on the floor of the Senate, the following colloquy occurred between Senator Dill, principal author of the Senate bill, and Senator Willis:

"Mr. Dill . . .
After we got it out [of Committee] we realized that the 'common carrier' phrase was an unwise phrase to say the least . . .

* * *

"Mr. Willis. I think that remedies one serious objection I had in mind, as to line 12, particularly, which is proposed to be stricken out, where it says 'or for the discussion of any question affecting the public.'
"Mr. Dill. That is a rather broad statement.
"Mr. Willis. Yes." (67 Cong. Rec. 12358).

Senator Howell disagreed with the amendment and stated that:

"It [the provision respecting candidates] is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions."

Senator Dill responded:

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time . . . I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time . . ." (67 Cong. Rec. 12504).

by the Senate and, after slight modification in conference,[98] enacted as Section 18.

Several years later, the 72nd Congress adopted a bill (H.R. 7716) which would have amended Section 18 to extend the "equal opportunities" requirement to situations where a broadcasting station was used "in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . .*" (emphasis added). The report of the House conferees stated: "This amendment broadens Section 18 . . . designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office or in the presentation of views on public questions." H. Rept. No. 2106, 72d Cong., 2d Sess. 6 (1933). The bill, however, was pocket vetoed by President Hoover.

In the following Congress, which enacted the 1934 Act, the Senate Committee reported a bill containing a proposed Section 315 identical to the proposed amendment to Section 18 included in H.R. 7716, discussed above. The report of the committee stated that the proposed section "extends the requirement of equality of treatment of political candidates to supporters and opponents of political candidates, *and public questions before the people for a vote.*" S. Rept. No. 781, 73d Cong., 2d Sess. 8 (1934). (Emphasis added.) Although this bill was adopted by the Senate,

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[98] Even though the language was stricken in the final Senate bill, the Senate conferees apparently urged the adoption of a section containing the "questions affecting the public" language at the Senate-House conference on the 1927 Act. The Senate debates on the bill reported out of conference contain the following:

> "Mr. Howell: Yes, the Senate Conferees . . . are still in favor of these provisions; but I am informed that at least two of the House conferees insist that if these provisions are reinserted the bill will be kil[illegible] (67 Cong. Rec. 4152).

the House refused in conference to accede to the
193 Senate provision, and Section 315 was enacted in language identical to Section 18 of the 1927 Act. See H. Rept. No. 1918, 73d Cong., 2d Sess. (1934).

Thus, Congress in 1959 was plainly mistaken in its view that the Commission's fairness doctrine was authorized under the 1934 legislation. In light of the negative character of the language in the 1959 amendment, it is evident that this language does not have operative effect and is no more than a misguided attempt to protect against implied repeal an "obligation" erroneously presumed to exist under legislation enacted by another Congress 25 years previously. See *United States* v. *Price,* 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *United States* v. *United Mine Workers of America,* 330 U.S. 258, 281-82 (1947).

Even assuming, *arguendo,* that the 1959 amendment is to be given operative effect, it does not follow that the proposed rules in question are authorized with the explicitness required by the Supreme Court decisions discussed above. The 1959 language relating to "fairness" is very general in form, in marked contrast to the specific language of the Section's provisions concerning "equal opportunities." At most, there is a broad direction or policy pronouncement that licensees should "afford reasonable opportunities for the discussion of conflicting views on issues of public importance"; and perhaps the Commission is thereby authorized to consider a licensee's overall "fairness" in the presentation of public issues in determining whether its operations have been in the public interest.

The proposed rules, however, are very specific in application. If a licensee endorses a political candidate, it must within 24 hours offer "a reasonable opportunity for a candidate or a spokesman of the candidate to respond. . . ."

Similar provisions would apply in the case of "personal attacks" on an "identified person or group." The
194 rules would thus extend in only slightly attenuated form the "equal opportunities" obligation that Congress has restricted to "legally qualified candidates" and which, as discussed above, it has declined to extend to other persons (see *Felix* v. *Westinghouse Radio Stations,* 186 F.2d 1, 3-6 (3rd Cir. 1950), *cert. denied,* 341 U.S. 909 (1951)). In the context of a narrowly drawn "equal opportunities" requirement and the Act's prohibition against Commission interference with freedom of speech (§ 326), the general "fairness" language of the 1959 amendment clearly lacks the requisite explicitness to constitute authorization for a Commission directive that persons and groups (other than "legally qualified candidates") must in specified situations be afforded the opportunity to use the licensee's facilities.

195 CONCLUSION

Upon the foregoing premises, the parties to these Comments respectfully urge that this proceeding be terminated without rule making because the Commission's fairness doctrine and Section 315, upon which rule making is predicated, violate the First Amendment or because the fairness doctrine is otherwise unlawful.

Respectfully submitted,

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Radio Television News Directors Association

Reams Broadcasting Corporation (WCWA-AM-FM), Toledo, Ohio

RKO General, Inc. (WOR-AM-FM-TV), New York, New York; (WHBQ-AM-TV), Memphis, Tennessee; (KHJ-AM-FM-TV), Los Angeles, California; (WNAC-AM-TV, WRKO-FM), Boston, Massachusetts; (WGMS-AM), Bethesda, Maryland; (WGMS-FM), Washington, D.C.; (KFRC-AM-FM), San Francisco, California

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Roywood Corporation (WALA-TV), Mobile, Alabama

Time-Life Broadcast, Inc. (KLZ-AM-FM-TV), Denver, Colorado; (WFMB-AM-FM-TV), Indianapolis, Indiana; (WOOD-AM-FM-TV), Grand Rapids, Michigan; (KOGO-AM-FM-TV), San Diego, California; (KERO-TV), Bakersfield, California

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June 20, 1966

APPENDIX A

Inhibitive Effects of The Section 315 "Equal Opportunities" Provision And the Fairness Doctrine

Broadcasters are consistently and directly inhibited from producing public service programming by the "equal opportunities" provision of Section 315.

As CBS president Frank Stanton has stated:

> "• • • Whatever the objectives of fairness and equality in which section 315 was doubtless originally rooted, 30 years of experience have established that the section represents an idea which once may have seemed to be good, gone completely wrong.
>
> "The inescapable conclusion is that section 315 does far more harm than good, and that its result is neither to increase diversity of opinion nor expand free speech, but rather as a matter of practical necessity is a compelled suppression and blackout.
>
> "This compulsion is as simple as it is obvious: Time and time again radio and television have been unable to present candidates to the American people because broadcasters have known that under section 315 a half hour to a Democratic or Republican candidate can mean a total of 4, 8, or 16 half hours to obscure and unknown opponents. So when a half hour has had to be multiplied to 8 hours, we have had to forego the half hour. The result has been less, not more, broadcasting in the public interest."[1]

Dr. Stanton has also explained why Section 315 does not work to the benefit of significant third-party candidates:

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[1] *Hearings on Political Broadcasters-Equal Time Before a House Subcommittee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 123 (1959).

197 "As a practical matter, the Norman Thomases do not get an opportunity in the campaign unless the stations give time to the Democratic and Republican candidates. I am now speaking under 315.

"If we moved from the restrictions of section 315, I am persuaded that responsible broadcasters would give time, or give an opportunity for the significant third-party spokesman to inject their discussion of the issues at least as they see them in the campaign.

"In the 1960 campaign for President and Vice President, when we had the temporary suspension, all three of the network groups gave time to the third-party candidates, or to the third parties. Even Norman Thomas was invited on to one of those programs, though he was not a candidate in 1960, but because he represented a point of view which the network organization felt should be given some airing.

"We could not have done that if section 315 had been in effect because to open it up to a handful of minority parties, as we did in the 1960 campaign—and when I say 'we' I mean that all 3 of the networks did it—we would have opened ourselves up to possibly as many as 14 other demands for equal time.

"So that prior to 1960, what happened was that the broadcaster did not offer any time and did not live up to the full opportunity that he had within his capabilities simply because he knew that he would be inundated by requests from insignificant splinter parties and groups."[2]

The present Section 315 requires, except for the narrow "news" exceptions, that any free or purchased broadcast

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[2] *Hearings on Political Broadcasts Before the Senate Committee on Commerce*, 87th Cong., 2d Sess. 38-39 (1962).

time for candidates be made available on an equal basis for all candidates in that race. Parties to these Com-
198 ments have been inhibited by this requirement from providing *any* air time in election situations in which to do so would have tied-up their facilities with "fringe" candidates beyond a point which they believed to be in the public interest.

One party states the following:

"Two specific examples of situations which caused us to restrict our political programming occurred within the recent past:

"In the 1965 fall primary elections for the [City] Council, 65 candidates were entered on the ballot. Great public interest centered around only a few of these candidates and, had the limiting provisions of Section 315 not been in effect, we would have presented at least two types of programs to satisfy the interests of our listeners and viewers. One of the types would have been a documentary program examining the personalities of the leading contenders as well as the issues involved. In another program type, we would have presented the leading candidates answering questions put to them by staff newsmen. Obviously, any such service to the public was made impracticable because of the necessity for providing equal opportunities for the appearance of the remaining candidates of the total of 65 involved.

"For the same reasons we avoided special programs relating to the election of 6 persons as members of the Board of Trustees for [a local college] from a field of 54 candidates."

Another party writes:

"We have encountered definite restrictions where we have been inclined to offer free time to political can-

didates. The reason being that the principal candidates would be the logical users of valuable prime free time, but the also-rans and the so-called lunatic fringe preclude such offerings. In this state, the two principal
199 candidates receive more than 95% of the votes and the miscellaneous others split up a mere nothing."

This party explained:

> "[We] offered the two then candidates for the office of U.S. Senate . . . free prime time for debate. This offer was made a day or two before the end of the filing dates, and when these two principal candidates were the only candidates. They accepted the offer, the debate was scheduled, and announced publicly.
>
> "At the last minute, before the deadline for filing, [another person] filed his candidacy which only required 350 names on a petition, and then proceeded to demand equal time. We gave [him] thirty minutes of prime time. It was a most pitiful, disgraceful performance. * * * As a result of this experience, we will no longer offer free time for political candidates where we are likely to get involved with miscellaneous, also-rans, and lunatic fringe candidates demanding equal time. Clearly this removes from the sincere and proper candidates the opportunity to use free and prime time on our stations . . . and just as clearly it indirectly means that the unknown minority and fringe candidates are exercising a veto and keeping the principal candidates off the air under free time conditions."

Still another party to these Comments gave this example of "self-censorship" coerced by Section 315:

> "In the 1964 . . . General Election, there were 17 candidates for County Sheriff. None of the candidates was a familiar political figure and [the station] wanted very much to present four or five of the candidates to its au-

dience so that they might become acquainted with the important (we felt) candidates. The remaining 12 or 13 candidates were largely ex-policemen, perpetual office-seekers, and people with histories of brushes with law enforcement. An hour of public service time could have been devoted to the leading candidates which would have informed the public and helped the candidates. A program on which all 17 appeared would have given each candidate something under 4 minutes and would have served only to confuse the electorate even further. Obviously, such a program was not produced."

One party observes that the Section 315 effect of suppressing regular reports from incumbents seeking re-election deprives the public of information in which it would have had an interest.

The inhibiting effects of the fairness doctrine are admittedly more subtle, especially because the Commission in effect compels the broadcasting by a licensee of at least some controversial public issue programs "in the public interest." A number of the parties to these Comments have expressed the view that they approach possible programs involving controversial issues and open debate with great caution because of the complexities and burdens of the fairness doctrine. One party noted that it finally decided as a matter of safety on one issue to give time to the KU Klux Klan and similar organizations. This party concluded that "to some extent the time devoted to the 'lunatic fringe' is at the sacrifice of the time devoted to understanding the real issues." Several parties indicated that they would give more time to programs involving controversial issues if it were not for the "nut" factions that claim time under the fairness doctrine.

Even viewpoints which the licensee would concede to be "significant" can be so varied on any particular issue that

the station is inhibited from undertaking a review of them. Some of the experiences of the parties follows:

1. "A typical example would be a program involving the race problem in which inordinate numbers of splinter groups claim to represent significant and slightly different points of view. A panel discussion would be impossible because of the large number of groups to be represented, and a documentary program would lose
201 effectiveness and be unsuited for broadcast if it were handicapped by the need to cover all points of view.

"Another instance might concern a broadcast covering the pros and cons of flouridation of the municipal water supply to prevent tooth decay. Suppose we arrange a broadcast debate between qualified medical or dental authorities arguing the benefits and dangers of adding flouride to the water supply. Following the debate, a group representing civil liberties accuses us of not touching on the legal aspects of flouridation, where upon another debate is arranged. Following this, a taxpayers' group asks for time to expose another side of the problem, the cost of initial equipment and continuing costs of chemicals used in the flouridating process. This calls for another debate, or at least the representation of this viewpoint, and then its opposing viewpoint, perhaps by a city authority. And on and on. The point is, we would not feel free to do what a newspaper does when it covers only one aspect of a problem—in this case, whether flouridation is beneficial or harmful to health."

2. "[We] investigated the possibility of presenting a program on the right of the United States to pursue its present course in the war in Vietnam. It was our original intent to present only the 'hawk,' 'dove,' and administration viewpoints. However, our investigation led to the belief that there were so many other views

of the situation, e.g., 'pacifist,' that we could not present all of them and hence, decided not to schedule the program."

3. "There are several conflicting viewpoints on the Jr. College situation. That segment of our population that are old enough to have seen their children through college only want to protect their tax base. They are against any expense of education, and especially 'squandering money on needless Jr. Colleges.' There is a definite group who favor a broad based Jr. College
202 program (such as California has established) which would create a sizable number of Jr. Colleges in the state to augment the few now in existence. This would require the selection of locations (bickering between cities), increased taxes, the transfer of some students et cetera. There is another group that doesn't believe in the Jr. College system because of intellectual reasons, and who favor more the trade school or vocational school techniques.

"The several private colleges in this state which depend upon substantial enrollment fees understandably are not enthusiastic about an expanded Jr. College system.

"I trust we have already gotten sufficient detail to show you varying viewpoints. We would like very much to editorialize on behalf of the forgotten student from the high schools of this state who deserve an opportunity for higher education, whose parents have been paying state taxes low these many years. If we were to devote editorial time to this subject, we would be submerged by requests from all kinds of sizable groups who have conflicting viewpoints. We do not wish to get involved in this kind of squabbling and cluttering up of our broadcast schedules, and to add to the public confusion of the issue."

Various parties also express reluctance to program one side of an argument in such circumstances as when the "other" side refuses to appear, or when such programming would likely invite requests for time on a number of issues (e.g. The John Birch Report).

Various parties to these Comments find that fairness doctrine restrictions on editorialization produce results such as fewer editorials, inhibitions regarding the endorsement of political candidates, and inability of radio and television to balance one-sided newspaper opinion in the community by presenting more of another side (the latter point being true of all controversial public issue programming).

203 The many-sided-issue complaint of broadcasters is heard also with respect to editorials:

> "The problem of a supplemental water supply for our area presents a many sided controversy in that there are several potential sources of water, a myriad of ways in which the water can be delivered and an unending array of potential tax sources for payment of water. Were we to endorse a single course of action in any of these three matters and take an editorial position, the requests for air time to air differing viewpoints would be overwhelming. There are other issues similarly complex, but the one above is the best current example."

Similarly, a number of the parties find that the personal attack doctrine as enunciated even prior to rule-making is burdensome administratively, and that it tends to inhibit the station from controversial issue programs in general, and discourages live, discussion programs in particular. Said one party: "This requirement, in our opinion, effectively discourages the use of the live, informal discussion programs." Said another: "This requirement would make me extremely hesitant to do a documentary on an undesirable political situation."

Any controversial public issue for which there is a definite point of decision raises another problem. Whether it be an election of officials, a referendum, or the vote of a legislature (or the veto of a chief executive), the broadcaster is obligated to provide time for all sides of the controversy before that point of decision. In many cases, the complexities involved in ascertaining significant viewpoints, and deciding upon the appropriate format and amount of time for reply, are so great, and the time remaining is so short, as to discourage the licensee from presenting any discussion of the issue. In some cases, of course, a licensee is forced to make a decision on a complex situation, often without Commission guidance and in a short
204 space of time. How many individual stations could have been expected to react as the networks did in the three following cases?

1. On February 11, 1959, Lar ("America First") Daly, requested equal time on WBBM to campaign for the office of Chicago mayor; CBS refused his request. On February 19, the FCC directed CBS to provide equal time to Daly. On February 20, CBS refused to comply and filed with the Commission a petition for reconsideration. The election was held on February 24. How many individual stations, with an FCC decision pending against them, would have stood by their determination on the equal-time question pending a decision on a petition for reconsideration? (The Commission reaffirmed its decision of February 19 on June 17, 1959.) See *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83 (7th Cir. 1962).

2. On November 1, 1956, five days before election day, Adlai Stevenson and the Socialist Party candidate for president by telegram requested equal time on the three major broadcast networks to respond to an address on the Suez crises delivered to the nation by President Eisenhower on October 31. On the same day, the three networks by

telegram requested the advice of the FCC to the effect that no such equal time was required. On the same day, the FCC by telegram advised the three networks:

> "For the FCC to conclude that Section 315 does not apply in the circumstances you have outlined is dependent on such an involved and complicated legal interpretation that we are unable to give you such a declaratory ruling at this time." 14 R.R. at 720.[8]

On November 5, the Commission informed the networks by telegram that equal time is not required when the President reports to the nation on an international crises. The election was held on November 6. How many individual stations would have waited until the day before the election before making a final decision on whether to give Governor Stevenson and the Socialist Party candidate equal time? See *Columbia Broadcasting System, Inc.*, 14 R.R. 720 (1956).

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3. Immediately after the Supreme Court, on October 28, 1964, denied a writ of certiorari to review a denial of equal time to Senator Goldwater, the Republican National Committee requested time under the fairness doctrine. On October 29, the Republican National Committee complained to the Commission that the networks had rejected its request. On November 2, the Commission released its decision that the networks had acted within their discretion in refusing time to Senator Goldwater. The election was held the next day. How many individual stations, with a complaint pending against them, would have waited until the day before the election before making a final decision on whether to provide time to Senator Goldwater? See *Republican National Committee*, 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC*, by 3-3 decision

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[8] Commissioner Hyde dissented: "The answer is clear in the language of the statute . . . ." 14 R.R. at 722.

of the U.S. Court of Appeals for the District of Columbia, No. 18935 Oct. 27, 1964, *cert. denied,* 379 U.S. 893 (1964); *Republican National Committee,* 3 R.R. 2d 767 (1964).

Parties to these Comments have experienced similar situations which have forced them to act at their peril in denying a request for reply time.

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APPENDIX B

Application of the Fairness Doctrine to Religious Questions

In the "Fairness Primer"[1] the Commission traced the history of the development of the fairness doctrine as a part of the regulatory process. The first cited decision involving the application of the principle of fairness was *Great Lakes Broadcasting Company,* 3 FRC Ann. Rep. 32 (1929), in which a station whose programming was devoted exclusively to the religious beliefs of a single sect had applied for a modification of its license. In denying the application and granting that of a mutually exclusive competitor, the Federal Radio Commission stated that "the station is used for what is essentially a private purpose . . . and, in addition, is constantly subject to the very human temptation not to be fair to opposing schools of thought and their representatives."[2] In 1938, the Commission denied the application of a group who proposed to use a station "primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible" and who had stated that "in connection with religious broadcasts, the station's facilities would be extended only to those whose tenets and beliefs in the interpretation

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[1] 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[2] Quoted in *Young Peoples Association for the Propagation of the Gospel,* 6 F.C.C. 178, 181 (1938).

of the Bible coincide with those of the applicant.'"[3] It is thus apparent that during the early days of radio regulation, the Commission and its predecessor established that an important factor in a licensee's legal obligation to serve the public interest was the obligation to be "fair" in its programming and that this obligation was applicable to religious questions.

207 In 1946, the Commission received the complaint of an atheist who alleged that three California stations had broadcast direct arguments against atheism as well as numerous church services, Bible readings and prayer meetings, but had refused to make time available to proponents of atheism.[4] The stations replied to the complaint arguing that (1) the carrying of programs on atheism would not be in the public interest and (2) the question of the existence of a deity was not a controversial issue of public importance in their service areas.

The Commission dismissed the petition, apparently because it felt many stations had indulged in similar practices and the selection of these three particular stations for punishment would be arbitrary. The opinion discussed freedom of speech and indicated the Commission's position that under the First Amendment a licensee could not bar protected speech from access to the airways. Using as examples the minority position of the early Christians and the attacks by established churches on some of the ideas of Jefferson, Jackson, and Lincoln, the opinion went on to point out that as long as open discussion of all viewpoints is permitted, sound ideas and institutions become stronger under criticism. Although stating that an individual licensee was permitted a wide discretion in deciding which

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[3] *Young Peoples Association for the Propagation of the Gospel, supra* note 2, at 180.

[4] *Robert Harold Scott*, 11 F.C.C. 372, 3 R.R. 259 (1946).

views and which spokesmen should be presented, the Commission stated that:

> "The fact that a licensee's duty to make time available for the presentation of opposing views on current controversial issues of public importance may not extend to all possible differences of opinion within the ambit of human contemplation cannot serve as the basis for any rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity."[5]

208 In the aftermath of the *Scott* decision, the Commission was subjected to a great deal of criticism by broadcasters, the press, the clergy and Congressmen.[6] The decision was widely interpreted to mean that, when religious programming was carried, "equal time" had to be allocated to atheists.[7] While this storm of criticism brewed around the Commission, it did nothing for almost two years, apparently heeding the advice of its Director of Information, who on December 6, 1946, in a memorandum entitled *Scott Decision* v. *Public Relations,* advised the Commission that "to attempt clarification [would] prompt further argument" and would "surely be interpreted as a sign of weakness on the part of the Commission."[8]

Then, on April 27, 1948, the Commission deferred action on the renewal application of WHAM, Rochester, New York, pending the investigation of a complaint by a member of the Rochester Society of Free Thinkers. The complaint concerned a request for time to answer remarks made in a

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[5] 11 F.C.C. at 376, 3 R.R. at 264.

[6] See Smead, *Freedom of Speech by Radio and Television* 61 (1959).

[7] See Commission letter to Congressman Kersten, reprinted in *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 200 (1948).

[8] Reprinted in *Hearings, supra* note 7, at 184.

sermon by Father Ignatius Smith of Catholic University. The sermon clearly attacked atheists by warning that:

> "If the godlessness, the irreligion of so many dozens of millions of our people continues to grow, our greatness is doomed and our future is damned.
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> • • • •
>
> "America cannot be preserved by godlessness.
>
> • • • •
>
> "We are battling against indifferentism, communism, absolutism, and atheism."[9]

209 In a memorandum to the Commission, the staff indicated that the "station's position [was] squarely in conflict with the Commission's decision in the *Scott* case" and recommended a hearing on the renewal application.[10] The Commission deferred action on the renewal application and decided to request more information from the station. Although several staff letters to the station were drafted, the Commission did not finally approve a letter until July 12, 1948. The letter stated that the Commission's fundamental concern was with the question of whether "the Society of Free Thinkers or anyone else [had] been denied time by WHAM because WHAM disagrees with their point of view."[11] The draft letters prepared by the staff included questions concerning the "importance of balanced programming" and the Commission policy of making radio available to views falling within the protection of the First Amendment.[12] However, on June 19, 1948, the House of Representatives had passed House Resolution 691[13] appoint-

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[9] *Id.* at 141.

[10] *Id.* at 181.

[11] *Id.* at 183.

[12] *Id.* at 182.

[13] See *Final Report of the Select Committee to Investigate the Federal Communications Commission*, H. Rept. No. 2479, 80th Cong., 2d Sess. (1949).

ing a special committee to investigate the Commission, and, apparently remembering the previous storm of protest, the Commission sent the innocuous letter described above. In answer, WHAM submitted a very short letter, which in substance stated *no* time had been denied anyone because the licensee disagreed with their viewpoints.[14] Subsequently, on August 18, the license of WHAM was renewed without opinion.[15] At the Committee hearings on the *Scott* decision, Commission spokesmen tried to ward off congressional criticism by stating that the opinion held only that "a licensee may not, because of disagreement with a particular point of view, preclude the use of his facilities for the presentation of that point of view."[16]

We submit that this construction is a far cry from the commanding language of the *Scott* decision which concluded a discussion of the issues with the statement that "the criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech."[17]

This later construction of the *Scott* decision became official policy when on August 18, 1948, the day the WHAM renewal application was granted, the Commission addressed a letter to Edward J. Heffron, President of the Religious Radio Association, which stated that it had "never stated or indicated that atheists or persons with similar views are entitled to radio time upon request to answer or reply to the various religious broadcasts which may be carried by

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[14] *Hearings, supra* note 7, at 188.

[15] *Id.* at 183.

[16] *Id.* at 188.

[17] *Robert Harold Scott*, 11 F.C.C. 372, 376, 3 R.R. 259, 264 (1946).

a radio station."[18] On two separate occasions since the congressional hearings in 1948, Scott, through petitions to the Commission, has sought to make use of the rights of atheists to express their viewpoints under the fairness doctrine.[19] His requests have been denied both times on the grounds that the religious programs of the stations in question "did not present situations in which the station denied the opportunity for presentation of a controversial issue of public importance" (25 R.R. at 349). Thus, the Commission, without ever having explained its reasons, has come full circle from the position taken in the first *Scott* decision—that sound ideas become stronger under criticism—to the holding that religious programming does not present a controversial subject.

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In the light of these precedents and the apparent turnaround in Commission policy, it is interesting to note the Commission's decisions in two recent cases. In *Lamar Life Broadcasting Co.*, 5 R.R. 2d 205 (1965)[20] short-term license renewal was issued to WLBT, Jackson, Mississippi. The Commission held that the practice of excluding all of the area's Negro churches from a 10-minute daily program, in which other churches participated on a rotating basis, was obviously "inconsistent with the public interest" (*id.* at 220). In *Brandywine-Main Line Radio, Inc.*, 4 R.R. 2d 697 (1965), the Commission granted an assignment of licenses of WXUR, WXUR-FM, Brandywine, Pennsylvania, over the objections of a number of church and community groups that the assignee's president would use the station's facilities to broadcast intemperate attacks on

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[18] 3 R.R. 264-a.

[19] See Commission letters to Scott at 5 R.R. 859 (1949) and 25 R.R. 349 (1963).

[20] Reversed for failure to hold a hearing on the question of whether the station's programming had met the "public interest" standard of the Communications Act. *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001 (D.C. Cir. 1966).

people and groups who held religious or political views differing from his own. The Commission, after a discussion of the complaints, including the possibility of religious controversies, relied on the assignee's representations that it would abide by the fairness doctrine in the operation of the station and granted the application. These two cases suggest that the Commission policy concerning the controversial nature of religious programs first enunciated in the 1946 *Scott* decision may still be enforced in some circumstances. However, the Commission's action in *Mrs. Madalyn Murray,* 5 R.R. 2d 263 (1965), indicates that the lesson learned in the congressional hearings on the *Scott* case has not been forgotten. In *Murray,* the Commission was requested, pursuant to the fairness doctrine, to direct 15 Hawaii radio stations to afford broadcast time for
212 the discussion of atheism. In denying the request, the Commission held that no violation of the fairness doctrine had occurred. The concurring opinion of Commissioner Henry makes it clear that the Commission once again relied on the theory that "the carrying of a religious broadcast does not, in and of itself, mean that one side of a 'controversial issue of public importance' was presented."[21]

The *Murray* decision follows from the rationale adopted in the wake of the furor over the first *Scott* case. Atheists and free thinkers consistently have been denied the protections of the fairness doctrine since *Scott,* while Negro churches in Jackson, Mississippi, and Catholic and Jewish groups in Philadelphia have been held to be entitled to fair treatment. The decisions cannot be reconciled, and the only distinguishing fact seems to be that, in the one line of cases, atheists are involved, and, in the other, substantial pressure groups.

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[21] In Commissioner Henry's opinion, controversy would occur in a religious program only where "a bond issue or the nuclear test ban treaty" or some similar issue was mentioned in a sermon. 5 R.R. 2d at 266.

Comments of Bedford Broadcasting Corporation, et al.

Commissioner Loevinger in his dissenting statement in *Murray* recognized the dichotomy between the majority-concurring opinions in *Murray* and the *Brandywine-Main Line* (*WXUR*) case. First, examining the majority holding that the stations had acted in "good faith", he pointed out that the Commission has held in other cases that good faith alone is not enough to satisfy the fairness doctrine. He went on to state that:

> "If good faith were taken as the test of fairness, the most biased and dedicated extremist would be privileged to present the most partisan and one-sided programming, and the most conscientious and self-critical broadcaster would be subject to the greatest duty of balanced presentation. By such a construction the 'fairness doctrine' would penalize those who are most fair and would be self-defeating. The test of applicability must, therefore, remain the Commission's
> 213 judgment as to whether a broadcasting station has acted with 'fairness' in the sense that it has afforded a fair opportunity for the presentation of conflicting viewpoints on a given issue."[22]

He then proceeded to analyze the *Brandywine-Main Line* case in terms of the *Murray* holding and stated that:

> "As recently as March of this year the Commission had before it an applicant who proposed to broadcast unconventional and unpopular religious and political viewpoints. The majority in that case, over my objection, took some pains to state specifically that the broadcasting by a religious group of its own viewpoint exclusively was not in the public interest and did invoke the fairness doctrine which required the opportunity for the presentation of contrasting viewpoints. * * * [*Brandywine-Main Line* (*WXUR*), 4 R.R. 2d

[22] 5 R.R. 2d at 269.

697.] The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject."[23]

Commissioner Loevinger's suggestion that the Commission invokes the fairness doctrine in an arbitrary fashion is especially pertinent to a discussion of the doctrine because, as a Commission, he participates in the many fairness questions which are decided informally by the Commission or its staff. These decisions are not made public and hence are not available for analysis. The reported decisions on the subject, as Commissioner Loevinger has also pointed out, contain "no public exposition of views or rationale," the Commission being "either unable or unwilling to clarify and specify its own understanding of the 'fairness doctrine'."[24] In this context, the fore-
214 going analysis of the efforts of atheists to obtain "fairness" in the presentation of their viewpoint sheds a great deal of light on the Commission's enforcement of the doctrine in other areas.

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215 **Comments in Opposition to Proposed Rulemaking**

Comes now Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., through their attorneys, and submit comments in opposition to adoption of the proposed rule in the above-referenced proceeding. In support thereof, the following is shown:

Preliminary Statement

1. On April 8, 1966, the Commission released a Notice of Proposed Rule Making looking toward the adoption of cer-

[23] *Ibid.*

[24] Loevinger, *The Issues in Program Regulation*, 20 Fed. Comm. B.J. 3, 6 (1966).

tain rules dealing with the obligations of broadcast licensees in cases where personal attacks or editorials either supporting or opposing political candidates are broadcast over the licensee's facilities. With the exception of a few albeit significant changes which will be subsequently discussed, the proposed rules would embody and codify the Commission's prior interpretative rulings which have previously constituted part of the so-called "Fairness Doctrine."

216 2. The "personal attack" provisions of the doctrine presently provide that where a personal attack occurs over the licensee's facilities in connection with a controversial issue of public importance, the licensee must send a transcript or an accurate summary thereof to the individual or group attacked, together with an offer of time for an adequate response. In connection with station editorials endorsing or opposing political candidates, the licensee in appropriate circumstances must inform the candidate or candidates of the station's editorial opposing his or their candidacy or supporting the candidacy of a rival and offer a reasonable opportunity for response.

3. The procedure traditionally employed by the Commission where questions have arisen in these areas has consisted of censuring letters to the licensee and the question considered by the Commission at the time of renewal. If there were sufficient instances in which a licensee had failed to live up to his obligations under the doctrine, the Commission could very well determine that a short term renewal was called for or if the case were severe enough, that no renewal at all should be granted. And, of course, the power of revocation has always existed as an additional measure of enforcement.

4. It is submitted that the present policy and procedure followed by the Commission in connection with this aspect of the "Fairness Doctrine" constitutes a more effective, flexible, fair, and realistic approach than that contemplated by the proposed rule.

5. Paragraph (a) of the proposed rule is applicable where a "personal attack" is made upon the "honesty,
217 character, integrity or like personal qualities of an identified person or group . . .". Thus, the rule is objectionable initially on the basis of the very obvious ambiguity as to its applicability. What constitutes a "personal attack"? What are "like personal qualities"? What is an "identified group"? In paragraph 3 of the Notice of Proposed Rule Making, the Commission stated that one of the purposes of codification was to "make more precise the licensee's obligations in this important area." The wording with respect to the applicability of the proposed rule obviously falls far short of any desirable degree of precision. Therefore, since the applicability of the proposed rule is latent with substantial uncertainties, it is subject to challenge on the grounds that it does not sufficiently apprise the licensee of his duty and responsibility thereunder, and for this reason, it is probable that the rule, if challenged, would be struck down as being Constitutionally vague.

6. The only "certain" aspect of the proposed rule is that licensees will be subjected to forfeitures for violation. This will be an additional sanction and not a substitute one because a licensee's performance under the "Fairness Doctrine" will still be subject to review at renewal time. It is apparent, therefore, that the proposed rule would serve only to increase the burdens of the licensee under the "Fairness Doctrine" without removing any of its vagueness. Needless to say, in a situation where responsibilities are so vague but sanctions so certain, licensees will naturally be more reluctant to schedule programs of a controversial nature. The rule in the long run would therefore run precisely contra to that which the Commission
218 has recently sought to foster and encourage. See, Memorandum Opinion renewing license of KTYM, released June 17, 1966.

7. Codification of a doctrine which the Commission has previously conceded "does not apply with the precision of the equal opportunities requirement" is not an appropriate method of coping with the problem of fairness. See, *Fairness Primer*, FCC 64-611, July 1, 1964. The flexibility required in dealing with such broad and intangible concepts as "fairness" would not be available under codification. In the past it has frequently been possible to resolve "fairness" problems by an exchange of correspondence between the Commission and the licensee. Now, however, the proposed time limits will effectively preclude such conciliations. Practically speaking, because of the proposed time limitations for supplying a transcript or summary thereof, a licensee will, of necessity, have to decide whether a personal attack has occurred on his facilities without the benefit of a clarifying ruling by the Commission. The rule in effect therefore closes the Commission's door to what has previously constituted a valuable and effective service to the public and to the broadcast licensee. With codification, the Commission therefore loses a very practical tool of administrative flexibility.

8. As indicated above, one of the most conspicuous deficiencies of the proposed rule is the time limitation imposed upon licensees for compliance (seven days in cases of personal attacks and twenty-four hours in editorials concerning political candidates). These time limitations will require the licensee to make practically on-the-spot
219 judgments in an area where answers turn upon complicated factual situations and intangible legal considerations. The fact that correspondence with the Commission for a prior interpretative ruling will be precluded has already been mentioned. Even more distressing is the fact that such time limitations will additionally serve to preclude consultation by the licensee with Washington counsel on whose opinions licensees have traditionally been compelled to rely for resolution of such vague and intangible legal matters. It is simply not realistic to expect a

licensee whose talents lie in the specialized art of broadcasting to also be qualified as a legal scholar. It is submitted therefore that the time limitations of the proposed rule are impractical and totally unrealistic. As the proposed rule now stands, it would deprive the licensee of fundamental rights under the equally "fair" concepts of "due process."

9. The Commission in paragraph 3 of the Notice of Proposed Rule Making stated that the second purpose of codification is to enable the Commission to take effective action where the specified procedures are not followed. This is tantamount to an admission by the Commission that its policy procedures are ineffective. Such, however, is not the case. Recent years have witnessed an increasing use of censuring letters and short term renewals in cases where violations of the "Fairness Doctrine" have occurred.

10. It has been pointed out that codification would serve to increase the burdens of the licensee and would deprive the Commission of the flexibility it has previously had in resolving questions in this area. However, if the Commission should conclude that codification is desirable, then the present wording of the proposed rule should at the minimum be modified in the following respects in order to remove and clarify some of its present vagueness and uncertainty. For example, in paragraph 4 of the Notice of Proposed Rule Making, the Commission stated that the licensee in this regard will continue to be required only to make "good faith judgments." If "good faith" is to be considered as an element of compliance, then an appropriate phrase to that effect should be incorporated within the rule itself. The Commission further stated that the rules are directed to situations where there could be "no reasonable doubt under the facts that a personal attack had taken place." If such is in fact what is contemplated by the Commission, then the wording of the proposed rule should be amended accordingly. In Footnote 1, the Commission indicated that licensees "can and should

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promptly consult the Commission for interpretation of our rulings and policies." If this form of relief is to be afforded to the licensee, then the proposed rule should be amended to guarantee it. Finally, the proposed rule should be modified to provide a longer and more realistic time limitation within which the licensee will be given to comply. Such a time limitation should be sufficient to permit the licensee to evaluate the matter within the specific factual context and consult both with the Commission and with counsel. Anything short of such "fairness" violates the fundamental elements of "due process."

11. In conclusion, it is submitted that codification in this area is not only inappropriate, but it is completely
221 unrealistic and unnecessary. Determinations and compliance in this area can best be achieved through the Commission's existing procedures.

WHEREFORE THE PREMISES CONSIDERED, Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., respectfully request that the proposed rule not be adopted and that further action in this proceeding be terminated.

Respectfully submitted,

GRIFFIN-LEAKE TV, INC.
WBEN, INC.
KBIF, INC.

By /s/ FRANK U. FLETCHER
Frank U. Fletcher

By /s/ WADE H. HARGROVE
Wade H. Hargrove

Of Counsel: *Their Attorneys*

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June 20, 1966

224 **Comments of Golden Empire Broadcasting Company**

Golden Empire Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Golden Empire Broadcasting Company is the licensee of Stations KHSL and KHSL-TV, Chico, California and Station KVCV, Redding, California.

Golden Empire Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Golden Empire Broadcasting Company believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

225 Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Golden Empire Broadcasting Company therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

GOLDEN EMPIRE BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

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226 **Comments By Mission Broadcasting Company**

1. The Commission, by a notice of proposed rule making released April 8, 1966 (FCC 66-291) has requested comments with respect to proposed rules codifying policies and procedures heretofore established relating to the so-called "personal attack doctrine" and the matter of political editorials. Mission Broadcasting Company urges the Commission not to adopt the proposed rules. It is of the opinion that the subject matter covered by the notice of proposed rule making requires complete re-evaluation by the Commission.

2. Turning first to the so-called personal attack doctrine, we find no reasoned doctrine but a mass of contradictions. The Commission states that the doctrine is limited to those situations where a personal attack occurs in connection with a controversial issue of public importance. The Commission nowhere explains why such a limitation is necessary or desirable. If, for example, a personal attack is made during a program involving the discussion of

227 a controversial issue of public importance, the person attacked is entitled not only to an opportunity to reply but also to notice of the attack and he must be furnished a script of the program in which the attack occurred. This obligation is absolute—it is unrelated to the truth or falseness of the charge. If, on the other hand, a personal attack is made upon an individual during the course of any other type of program—e.g., by a disc jockey during an entertainment program; by a clergyman during a religious broadcast; by a news announcer or commentator during a news broadcast; etc.—the Commission's policy would not require the attacked person to be notified, he would not be entitled to a script, and apparently he could also be denied an opportunity to reply to the attack. This result would follow from the Commission's doctrine whether or not the charge was correct or false.

3. It is difficult to spell out a rationale for such a policy. The Commission at times states that the policy is based upon licensee responsibility. However, the Commission fails to apply the test. Presumably it is not responsible conduct for a licensee to broadcast or permit the broadcast of a personal attack upon an individual or group if the licensee either knows that the charge is false or is reckless in his failure to try to ascertain whether there is any truth to the charge. If that is the test, why
228 should a false personal attack by a disc jockey or a news commentator be differentiated from a false charge during a panel discussion. Or, if truth or bona fides of the licensee is the test, why apply the rule where the charges made are true? The Commission has never answered these questions.

4. The doctrine as enunciated leaves other questions unanswered. The implication in the Commission's policy is that by complying with the notice and script furnishing procedure the licensee is relieved of any responsibility for broadcasting a personal attack. It is difficult to believe that the Commission is prepared to permit such an abdication of licensee responsibilty by broadcast licensees.

5. The Commission has also stated that the personal attack doctrine is part of the fairness doctrine. Is it Commission philosophy that a well-rounded presentation on a controversial issue is not possible unless the person attacked is given the opportunity of replying? In other areas involving discussion of controversial issues, the Commission leaves it up to the judgment of the licensee to select the spokesman for the differing points of view. Why should the Commission, in the case of a personal attack, lay down a hard and fast rule that the presentation of the opposite point of view in such an attack must be by the person who is attacked? If the Commission believes that fundamental fairness requires that the person attacked be given an op-

portunity to state his point of view, this opportunity
229 should also be extended to a person attacked in an entertainment program or in a news program. The Commission says "no" but furnishes no reasoning for its answer.

6. The anomalies do not end here. The Commission has announced that the doctrine does not extend to personal attacks by political candidates, spokesmen or persons associated with them in a campaign as against other candidates, spokesmen or persons associated with them in a campaign. So far as candidate versus candidate is concerned, the Commission points out that the equal opportunity requirements of Section 315 is the governing consideration. But Section 315 does not apply when the candidate himself is not speaking. If during a political campaign, a personal attack is made by a non-candidate against another non-candidate, the notice and script-furnishing procedure is not applicable. Why not? The Commission offers no explanation. It merely states that it recognizes that it is in need of further experience to delineate more precisely the nature of licensee responsibility in this area. Mission Broadcasting Company believes that the same policy considerations which the Commission has not yet resolved with respect to attacks during political campaigns are also applicable to the entire field of broadcasting. The rigidity inherent in codification of rules should be avoided while the Commission is thrashing about for a reasonable exposition of policy.

230 7. The inconsistency of the Commission's basic position is revealed by its proposed rules on political editorials. If a licensee in an editorial supports or opposes a candidate, he must, within 24 hours, advise the interested person, furnishing him a copy of the editorial and give him opportunity for a reply. Political editorials clearly relate to electioneering but the Commission has indicated that it does not have sufficient experience in the area of electioneer-

ing to come up with a detailed answer. What is there about political editorials that gives the Commission confidence that it has had enough experience to warrant the adoption of detailed rules? A licensee can permit the supporter of a candidate to endorse a candidate, to oppose a candidate, or even to make a personal attack on the opponent. No specific rule comes into play to require notice or the furnishing of a script. However, if the licensee broadcasts a mild editorial supporting or opposing a candidate, the full panoply of notice and script-furnishing comes into existence. Does the Commission believe that there is a greater element of unfairness involved when the station editorializes than when it permits its facilities to be utilized? The Commission has given lip service to encouraging licensees to editorialize. It would appear that what the Commission grants with one hand it takes away with the other. In view of the proposed rule, it is difficult to believe that the Commission is really committed to the cause of station editorializing with respect to candidates. If that is its position, it should be forthright and say so. On the other hand, if it believes that licensees should editorialize in this area, there is no reason for the specific notice and script-furnishing rules. There should not be different rules in this area than in the case of other political broadcasts. The test throughout should be the responsibility of the licensee. If the licensee is acting responsibly; if he discharges his duty fairly and honestly, his conduct should not be controlled. On the other hand, if the licensee acts irresponsibly, this bears upon his qualifications. The Commission's rules, however, treat the responsible and irresponsible broadcaster in the same way.

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8. The time has come for the Commission to make up its mind in the field of discussion programs and political editorials. The Commission indicates that it encourages licensees to engage in these activities but it subjects them to artificial and unnecessary restraints. The test here, as

in any other aspect of broadcasting, should be licensee responsibility. If a licensee exercises responsibility, its conduct should be unregulated. If a licensee acts irresponsibly, a question is presented of basic qualifications. However, if the licensee permits an irresponsible charge to be aired, he does not acquire responsibility by furnishing a copy of the charge to the person attacked and giving the person an opportunity to reply. On the other hand, if
232 a licensee is acting responsibly, why should he be placed in a strait jacket as to the manner by which he achieves overall balance? There is an urgent need for a thorough re-examination of the whole area covered by the notice.

Respectfully submitted,

MISSION BROADCASTING COMPANY
/s/ JACK ROTH
By Jack Roth, *President*

June 20, 1966

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233 **Joint Comments**

1. The so-called "fairness doctrine" has been applied by the Commission to broadcast treatment of controversial issues of public importance. This doctrine, which had not been expressly established by the Communications Act or by Commission Rule, was initially propounded by the Commission in *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). Since then, the Commission has applied the "fairness doctrine" in various situations, including license renewal determinations. The

scope and application of the "fairness doctrine" has been developed by the Commission through policy statements and rulings on individual cases.[1]

2. The Commission now proposes to incorporate into its Rules provisions dealing with two of the various aspects of the "fairness doctrine." In brief the Commis-
234 sion proposes (a) "to codify the procedures which licensees are required to follow in personal attack situations,"[1] and (b) "to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates."[2]

3. The personal attack situation would be dealt with by proposed Sections 73.123(a) and (b) as follows:

> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities."
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> "(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other

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[1] See, *e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (July 25, 1964).

[1] Notice of Proposed Rule Making, para. 3, April 8, 1966.

[2] Notice of Proposed Rule Making, para. 7.

such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

"Note: In a specific factual situation the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a); Applicability of the Fairness Doctrine, 29 F.R. 10415."

Endorsement of, or opposition to, political candidates would be dealt with by proposed Section 73.123(c) as follows:

"(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of
235 the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities."

4. The undersigned licensees well recognize their obligation to operate consistent with public convenience, interest and necessity. Nonetheless, they believe that the "fairness doctrine" (including the proposed Rules to codify aspects of it) is not consistent with the First Amendment to the Constitution of the United States or with Section 326 of the Communications Act, and that, moreover, it thwarts, rather than serves, the public interest in free expression. Apart from these threshold objections, the proposed rules should not be adopted because there has been no showing of need for the proposed rules, because they do not offer reasonable assurance of achieving the objective—improved compliance—for which they have been proposed, because the matters to which the proposed rules are directed are not sufficiently precise to be sus-

ceptible to precise rules, and because liability for monetary penalties for violation of rules (to be assessed after the fact and with benefit of hindsight) should not be created in areas where reasonable men, acting in good faith under all of the circumstances presented, could reasonably differ on what is "fair conduct" in a particular situation.

I. The "Fairness Doctrine" Is Not Consistent With the Freedom of Speech Guaranteed By the First Amendment to the Constitution of the United States or With the Prohibition Against Censorship Contained in Section 326 of the Communications Act.

5. The Supreme Court has made clear that the freedoms of speech and press established by the First Amendment to the Constitution of the United States apply to
236 radio and television,[1] and that the protection afforded by these freedoms is not limited to past expression but also includes protection of future expression against prior restraints, such as those here proposed.[2] The Congress also expressly recognized the particular importance of freedom of expression in broadcasting by enacting Section 326 of the Communications Act which provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."[3]

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[1] See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Superior Films v. Department of Education, 346 U.S. 587, 589 (1954).

[2] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-19 (1931); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965); Mills v. Alabama, 34 U.S. L. Week 4418 (U.S. May 24, 1966).

[3] 47 U.S.C. § 326 (1964 Ed.).

The Commission, as well, has repeatedly recognized the limitations placed on its powers by the First Amendment and by Section 326.[4]

6. It is possible to accommodate need for some degree of government regulation of radio (due to limitations on the spectrum) with the fundamental principles of free speech and free press. Thus, the Commission[5] has
237 in past cases properly refused to interfere with licensee discretion concerning specific program content,[1] except in those special situations where a recognized limitation on free speech comes into play[2]—for example, defamation[3] or indecent language.[4] The courts have also been strict in this respect.[5] Thus, in considering Commission regulations prohibiting certain kinds of program contests, it was ruled that insofar as some of the prohibitions "go beyond the scope of Section 1304 of the Criminal Code [prohibiting lotteries], they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment."[6] The

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4 Commission Policy on Programming, 20 R.R. 1901, 1905-6 (1960).

5 "Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that *the fulfillment of the public interest requires the free exercise of his independent judgment.*" Commission Policy on Programming, 20 R.R. 1901, 1908 (1960) (emphasis supplied).

1 Rev. J. Richard Snead, 15 R.R. 158, 160 (1957).

2 Commission Policy on Programming, 20 R.R. 1901, 1909 (1960).

3 Captain James I. Hamilton, 16 R.R. 170, 171 (1957).

4 Palmetto Broadcasting Co., 23 R.R. 483 (1962).

5 One court said "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 599 (3rd Cir. 1945).

6 American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953); *aff'd*, 347 U.S. 284 (1954).

court went on to say that, even if the Commission felt that such programs had no value to society, they were as entitled to the protection of free speech as the "best" programs.[7]

7. Under the accommodation described above the Commission focuses on the importance of licensee responsibility but is not permitted to interfere with program decision-making. Thus, while the Commission properly may
238 prohibit certain network affiliation provisions which it feels could result in the licensee abdicating its discretion,[1] and expect its licensees to ascertain the needs and interests of the community to be served and to take them into account,[2] it cannot dictate which network programs should or should not be carried by an affiliate or dictate how a station should serve the needs of its service-area.

8. Freedom of speech is violated by, and censorship results from, the "fairness doctrine" in two ways—because it acts to inhibit a licensee from carrying programming it feels is in the public interest and because it forces a licensee to carry programming which it may feel is not in the public interest. For example, under the proposed candidate endorsement rule, if a station simply states that it favors the election of a certain candidate, it is required to allow replies which may go far beyond the station's endorsement in length and content. Moreover, this requirement would exist even if the station has

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[7] *Ibid.*

[1] National Broadcasting Co., Inc., 319 U.S. 190 (1943); see also Simmons v. Federal Communications Commission, 169 F.2d 670 (2nd Cir. 1948).

[2] Statement of AM or FM Program Service, Broadcast Application (AM-FM), Section IV-A, Attachment A; Suburban Broadcasters, 20 R.R. 52 (1960), 20 R.R. 951 (1960), *aff'd*, Henry v. Federal Communications Commission, 302 F.2d 191 (D.C. Cir. 1962); Commission Policy on Programming, 20 R.R. 1901 (1960).

previously aired, extensively and equally, the views of the opposing candidates. Thus, the effect of the proposed rule would be to discourage stations from taking editorial positions on candidates. This would be not only contrary to the First Amendment and Section 326 but also would be inconsistent with the Commission's apparent encouragement of stations to editorialize! *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). This infringement on free speech cannot be justified as one of the special limitations on the First Amendment customarily recognized by the courts, such as defamation, indecent language, or "clear and present danger."[1] There has been no showing of any countervailing public interest reason to expand the foregoing special limitations to include the "fairness doctrine." Quite to the contrary, it is clear that when a licensee has exercised his own best judgment as to how to deal with a controversial issue of public importance, this judgment must not be forced to yield to Commission formulae, procedures or rules, such as those comprising the "personal attack" and "candidate endorsement" areas under the "fairness doctrine."

9. Any doubt that may have existed on this point has been swept away by the Supreme Court's holding four weeks ago that the freedoms guaranteed by the First Amendment were abridged by a statute making it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them. *Mills* v. *Alabama,* 34 U.S.L. Week 4418 (U. S. May 24, 1966). There the Court observed:

> ". . . Suppression of the right of the press to praise or criticize governmental agents and to clamor and

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[1] Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951), rehearing denied, 342 U.S. 842 (1951).

> contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free . . . . It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." (34 U.S.L. Week 4419).

240 Moreover, in rejecting the lower court's argument that the statute was valid because it seemed "within the field of reasonableness" and served the "good purpose" of preventing editorials that could not be answered (in that case because of time factors) the Court said:

> ". . . We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime to do no more than urge people to vote one way or another in a publicly held election." (34 U.S.L. Week 4420).

Here, too, for example, a regulation that a station may not editorialize for or against a candidate without also inviting broadcast of a responsive statement on behalf of candidates opposing the one who was endorsed or on behalf of the candidate who was opposed by the editorial, without facing a fine of as much as $10,000, *is* a "muzzle" and *is* an abridgement of constitutionally guaranteed freedoms which cannot be saved by any test of reasonableness.

III. Even if the Proposed Rules Would Be Lawful, There Has Been No Showing That They Would Result In Improved Compliance—Their Stated Objective.

10. The Commission stated that it has proposed to adopt rules governing the instant two areas under the "fairness doctrine"—personal attack and support of or opposition to political candidates—to "make more precise licensee obligation in this important area" and to "assist the

Commission in taking effective action in appropriate circumstances when the procedures are not followed."[1] In short, the rules appear to be directed at curing problems of non-compliance and enforcement. However, the
241 Commission has made no showing that there is or has been a substantial problem of non-compliance or enforcement in these two areas under the "fairness doctrine," or that such problems as may have been encountered in these two areas are any more prevalent or significant than problems encountered in other areas under the "fairness doctrine" for which rules have not been proposed. Thus, the Commission has not shown the need for the proposed rules, even if it be assumed that such rules would be lawful.

11. Nor has the Commission shown that, whatever the present situation with respect to compliance and enforcement in the two areas, this would be improved by the proposed rules and their threat of lines. The fact is that the Commission, with its powers over renewal of license, appears to have achieved a high degree of compliance with and enforcement of its "personal attack" and "candidate endorsement" aspects of the "fairness doctrine" notwithstanding their doubtful legality.

12. Moreover, it is doubtful that improved compliance would in fact result from the proposed rules, for they present on their face new and troublesome questions about their scope and meaning. For example, the proposed provision dealing with attacks by a person "associated" with one candidate in a campaign upon a person "associated" with another candidate in the campaign could lead to great confusion as to what may be required of a station in a particular case. In the give and take of political campaigns it is not always clear who is "associated" with a

[1] Notice of Proposed Rule Making, paras. 3, 7.

candidates in a campaign, and it is not unheard of for candidate and others to become "disassociated" or to change associations during a campaign.

242 III. THE PROPOSED RULES SEEK TO CODIFY ASPECTS OF THE "FAIRNESS DOCTRINE" WHICH ARE UNSUITABLE FOR CODIFICATION; MORE PRECISE LICENSEE RESPONSIBILITY IN THESE AREAS WOULD NOT BE ACHIEVED BY THE PROPOSED RULES.

13. The Commission has stressed its view that the proposed rules would "emphasize and make more precise licensee obligation in this important area."[1] While the proposed rules, carrying with them the threat of fines, would inevitably "emphasize" the "personal attack" and "candidate endorsement" areas of the "fairness doctrine," the Commission's attempt to make licensee responsibility "more precise" in these areas is unnecessary, inappropriate, undesirable and unsuccessful.

14. Even assuming the lawfulness of the "fairness doctrine," the proposed rules are *unnecessary* to define "licensee obligation" because the Commission has already spelled out its views in these areas in its general policy statements and in case-by-case determinations. The proposed rules add little to the previously established Commission policy, and such new clarifications as are set forth in the proposed rules (*e.g.*, the one week requirement for personal attacks, the 24-hour requirement for candidate endorsement or opposition editorials, and the exceptions in the Note to proposed Section 73.123(b)) could all be covered by a further policy statement.

15. Again apart from their lawfulness, the proposed rules are *inappropriate* and *undesirable* because the areas they would cover should more properly be left to case-by-

[1] Notice of Proposed Rule Making, para. 8.

case determinations based on *all* of the facts of the
243 situation. The Commission itself has stated:

> "we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle . . . ."[1]

It simply has not been shown that there is reasonable basis for singling out for purportedly precise enforcement certain aspects of a concept so inherently imprecise as "fairness." What may reasonably be concluded to be "fair" in one case may not be "fair" in another, notwithstanding what a specific rule may purport to declare is "fair" in all cases.[2]

16. Finally, the proposed rules would be largely *unsuccessful* in achieving greater precision of licensee obligation with respect to important aspects of the personal attack and candidate endorsement areas, for in many instances they do not even focus on problem areas. Thus, for example, the proposed personal attack rule leaves open such important questions as (a) within what time a person must accept a station's invitation to respond to an attack or to a candidate endorsement or opposition editorial, (b) the matter of licensee inquiries into the willingness of an attacked person to pay for time for the response, (c) the time or other limitations a station may impose on a response to a candidate endorsement or opposition
244 editorial,[3] and (d) the proper relationship of Section 315 and the fairness doctrine where they over-

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[1] Notice of Proposed Rule Making, para. 4. See also paras. 5 and 7.

[2] Indeed, the proposed rules may be so vague as to present questions of due process.

[3] This point is particularly difficult in view of the Commission's statement that the person responding to a candidate endorsement or opposition editorial may be entitled to more than "equal time." Notice of Proposed Rule Making, para. 7.

lap.[1] Moreover, the proposed exception for attacks by candidates, their authorized spokesmen, or those associated with them in the campaign, *against other* candidates, spokesmen, or persons associated with them in the campaign, may well give rise to more problems than it solves. There is no indication of what qualities characterize "spokesmen or persons associated" with a candidate in a campaign. Nor, apparently, has any thought been given as to how a licensee would proceed to determine such questions within the time limits imposed, or what it would do if there were disagreement, even among the candidates, as to whether an individual was a spokesman or an associate. For all of their apparent simplicity and precision, the proposed rules fail to give guidance in important areas —areas in which a licensee could be subjected to fines if he makes a decision (often under time duress) with which, having the valuable twin benefits of opportunity for unhurried reflection and hindsight, the Commission or its staff may later disagree.

IV. Liability for Forfeitures Should Not Be Created in Areas As Inherently Imprecise as "Fairness" Where Reasonable Men in Good Faith Can Differ on What, in Fact, Is "Fair."

17. In support of the proposed rules the Commission states that they "will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."[2] By this, the Commission apparently means that it would be able to
245 seek to impose fines of up to $10,000 for each willful or repeated violation of the proposed rules. This attempt to extend the Commission's power to levy for-

[1] Notice of Proposed Rule Making, paras. 5-7.

[2] Notice of Proposed Rule Making, para. 3.

feitures in an area as inherently imprecise as "fairness" would be undesirable.[1]

18. The Commission apparently recognizes the doubtful nature of seeking to apply monetary forfeiture procedures to the inherently imprecise area of "fairness," for it goes out of its way to stress that it does not *intend* "to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply," and that it *intends* to limit sanctions to cases where "there could be no reasonable doubt under the facts that a personal attack had taken place."[2] But the inappropriateness of rules in the "fairness" area that could lead to monetary forfeitures simply cannot be cured by the present Commission's assurances of its present intentions. The fact is that both intentions and Commissioners can and do change. Moreover, the fact remains that under the proposed rules licensees will be forced to make decisions in the areas in question more at their peril than in the past. Cases which, with the benefit of hindsight and time for leisurely reflection, appear to present "no reasonable doubt," may not be so clear at the time licensee decision is required, especially when there are time pressures. A station that decides in a close case that a person has not been personally attacked, or that decides that a person who has been attacked is an exempt associate of an opposing candidate, could be fined if it is later determined
246 that it made an error of judgment on the question of whether there was in fact a "personal attack," or whether there was an exemption. Under these circumstances, the proposed rules unreasonably—indeed, unfairly—expose licensees to liability for fines as much as $10,000

[1] This would be especially true if "willful" is interpreted to include a conscious act even though taken without specific intent to violate a rule, and if "repeated" is interpreted to cover such situations as failure to give timely notice to two persons "attacked" in the same broadcast.

[2] Notice of Proposed Rule Making, para. 4.

for isolated "wrong" decisions. This defect is especially glaring in light of the absence of any showing of past or present widespread or serious departures from the Commission's "fairness doctrine" policies and rulings under present practices and procedures.

WHEREFORE, the Commission should not only not adopt the new rules here proposed, but should abandon altogether its unlawful "fairness doctrine."

Respectfully submitted,

CORINTHIAN TELEVISION CORPORATION (KOTV)
GREAT WESTERN BROADCASTING CORPORATION (KXTV)
GULF TELEVISION CORPORATION (KHOU-TV)
INDIANA BROADCASTING CORPORATION (WISH-TV and WANE-TV)
POST-NEWSWEEK STATIONS (WTOP, WTOP-TV and WJXT)
W.A.V.E., INC. (WAVE and WAVE-TV)
WFIE, INC. (WFIE-TV)
WFRV, INC. (WFRV-TV)

By /s/ EDGAR F. CZARRA, JR.
Edgar F. Czarra, Jr.

By /s/ JONATHAN D. BLAKE
Jonathan D. Blake

Covington & Burling
701 Union Trust Building
Washington, D. C. 20005
Their Attorneys.

June 20, 1966.

Letter of the American Civil Liberties Union

246-A AMERICAN CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, New York 10010

June 17, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
2605 Avena Street
Wheaton, Maryland

Dear Mr. Waple:

The American Civil Liberties Union wishes to present its views on the Federal Communications Commission's proposed rule-making concerning the "fairness doctrine," and, more specifically, codifying the procedures which licensees are required to follow in personal attack situations and implementing the Commission's ruling on station editorials endorsing or opposing political candidates. (Docket No. 16574)

The Union's general support of the "fairness doctrine" was presented to the Commission in December, 1964. We endorsed the standards of the doctrine, which encourage the broadcasting of controversial points of view on public issues, as a significant step toward the implementation of the First Amendment's guarantee of freedom of expression, a guarantee designed to assure citizens a diversity of information and opinion. While noting that government regulation always holds the possibility of censorship, a danger to which civil libertarians are particularly sensitive, the ACLU stated its full backing for Commisison actions promoting diversity without interfering with program content.

In its 1964 statement the ACLU did express reservations, however, regarding the FCC's procedural requirements necessitating the submission of broadcast transcripts by

licensees to persons or groups attacked on the air. The Union was concerned lest the transcript procedure would place such an onerous administrative burden on the stations that it might result in their refraining from presenting controversial points of view at all. Questioning the advisability and practicality of such requirements, the Union urged the Commission to "re-evaluate them in light of their own experience and the practicalities of the broadcasting industry, especially in the context of this last election campaign [in November, 1964]".

246-B

In considering the Commission's present proposal, the ACLU has re-examined its own position on the procedural implementation of the "personal attack" principle. Under the proposed rule-making, "a licensee would be required to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack. . . . Along with the copy, the licensee would be required to send the attacked person or group a notice stating when the attack occurred and containing an offer of a reasonable opportunity to respond." The rule-making would leave to the "reasonable judgment of the licensee and to good faith negotiations" such other matters as the imposition of a reasonable time limit in which the person notified would be required to respond.

The Commission's proposed rule-making specifically exempts personal attacks in the context of the discussion of controversial issues and personal attacks by political candidates, their spokesmen and their campaign associates. These two exemptions remove the core of the ACLU objection to the original, broader procedural arrangement, which we felt would impose too heavy a transcript requirement on the stations. Therefore, the Union supports the FCC's proposed rule, directed, as it is, to the one

category of attacks on individuals and groups. The Union believes that the Commission's revision of the rule represents a positive step in the direction of diversity of opinion on the air, and it will still adequately protect the individual against unanswered attacks, in the interest of innate fairness.

The Union also agrees with the Commission's further exclusion from the "personal attack" rule-making of foreign groups and foreign political figures. As a practical matter, the ACLU believes, it would be virtually impossible to notify all foreign figures attacked on the air, and, in any event, it would be most inhibiting of free discussion to impose such a requirement. For example, it would be obviously impractical, indeed absurd, to require stations to make the "personal attack" machinery available to such personalities as President Charles de Gaulle, or Queen Elizabeth, or President Ho Chi Minh.

Finally, the ACLU also endorses the Commission's proposed rule-making that "the appropriate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be given 24 hours notification of the editorial and an opportunity to respond," with notification being required prior to broadcast in the case of station editorializing close to the election. In terms of fairness to both the candidate and the electorate, this proposal provides the opportunity for the candidate to present his points of view on public issues with the greatest accuracy, and it gives the electorate the full information which it needs to make intelligent choices in exercising the right of franchise.

All in all, the Union believes that the proposed rule acts in the interest of broadcasting diversity, by broadening

the scope of debate on issues of current importance and by this letter is happy to support it.

Sincerely yours,

/s/ JOHN DE J. PEMBERTON, JR.
John de J. Pemberton, Jr.
Executive Director

/s/ HARRIET PILPEL
Harriet Pilpel, Chairman
Radio-TV Committee

JdeJP & HP/ck

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251 **Comment of the United Steelworkers of America, AFL-CIO**

(1) The United Steelworkers of America is a labor organization affiliated with the AFL-CIO. Founded in 1938 it now represents over 900,000 workers in the United States and Canada.

(2) The United Steelworkers' interest in the proposed rule on Broadcast Fairness is twofold. First, it is interested as an organization which forwards policies which in large regions of the country are controversial. Second, it is interested in obtaining for its members and the public at large, a well-rounded discussion of controversial issues which affect the community.

(a) Our primary interest in this rulemaking proceeding arises from our desire to obtain a fair hearing in our promotion of legitimate trade union policies. Past
252 history and present realities make it clear that the labor movement remains a controversial issue in large areas of our nation. This is especially clear in the

South. In the South a regional prejudice against the labor movement exists. This prejudice has in the past and continues in the present to make it difficult for labor organizations to present their side of organizing campaigns, collective bargaining disputes and other related union activities. Local newspapers, radio and television stations are often controlled by interests unfriendly and often actively hostile to the labor movement. The communications facilities in many communities have presented only one side of the issue in labor disputes. Unions have time after time been denied access to the public forum to present their side of disputes. Documentation of this blackout was presented in Hearings, Administration of the Labor Management Relations Act by the NLRB, before the Subcommittee on National Labor Relations Board, in 1961.[1] We believe that some of these obstacles can be removed by the enactment of the proposed rule as expanded by our suggested amendment (see Attachment No. 1).

253 (b) The Steelworkers has a second reason for urging the adoption of the expanded rule. Our membership of almost one million has an interest as citizens of this nation in obtaining an open and fair forum for discussion of ideas of interest to the community. The expanded rule would serve as a positive force for encouraging such discussion, insuring a more informed public. The policy of encouraging open discussion of controversial topics in the broadcasting industry was announced in 1948 by Congress in Section 315 (47 U.S.C.), of the Federal Communications Act. The Commission has consistently forwarded the Congressional policy.[2] The adoption of the expanded rule would be a step toward the realization of

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1 87th Cong. 1st sess. (1961), Part I, pp. 292-331.

2 Commission; 1949 Report, Editorializing by Broadcast Licensee, 13 F.C.C. 1246; Fairness Primer, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, F.C.C. 64-611, FR 10415.

a broadcasting industry in tune with the Congressional mandates.

(3) The broadcasting industry and its spokesmen in comments already presented on this issue seem to forget that a broadcast license is a public trust, not an ordinary property interest. The licensee must, under Section 315
254 of the Federal Communications Act, afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The expanded rule will help the Commission carry out the intention of Congress.

The industry's argument rests on two grounds. First, the proposed rule would violate rights granted by the First and Fifth Amendments. Second, even if the rule is constitutional, it is unnecessary. The industry has failed to substantiate either of these arguments.

No court has ever upheld the industry's claim of total exemption under the First Amendment from Government regulation. The cases cited in a number of the industry's comments are applicable to newspapers but not to the broadcasting industry.[3] The broadcasting industry is not in the same position as newspapers are with regard to the protection of the First Amendment. This long standing view was made clear again in the recent case, *Office of Communications of United Church of Christ* v. *FCC*, F. 2d , March 25, 1966, before the United States Court of Appeals for the District of Columbia Circuit, where the Court made the following comment:

255 "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation imposed by law. A broad-

[3] *New York Times* v. *Sullivan*, 376 U.S. 254 (1963); *Mills v. Alabama*, 34 L.Week 4418, May 23, 1966.

caster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by an enfoceable public obligation. A newspaper can be operated at the whim or caprice of its owner, a broadcast station cannot."

This *United Church* case also makes evident the fallacy of the industry's Fifth Amendment argument. The broadcast license is not an ordinary property interest, it is a qualified grant of a monopoly subject to Government regulation. The licensee takes the property interest under an agreement to follow the rules laid down by the Commission. The industry is claiming an absolute property right which it never had.

The industry argues that even if the proposed rules are constitutional, they are unnecessary. The Congressional mandate is not an expression of an intent to leave to the industry the decision as to how it will act in this area. Self-regulation in many areas may be the best way of achieving the goals of national policy. The guarantee of a free forum for discussion in the broadcasting industry is not such an area. A free forum with access open to divergent points of view must be guaranteed. To allow one group, no matter how well motivated, absolute control over access to this forum would defeat the intention of Congress.

256 In summary we argue that the public interest can best be served through a clear codification of the fairness doctrine. To this end we support the proposed rule put forward by the Commission and urge its adoption. In addition, we urge two amendments to the proposed rule which would make it clear that Section 315 of the Federal Communications Act is carried out by guaranteeing the broadcast station will afford reasonable opportunity for the

discussion of conflicting views on issues of public importance. The amendments are attached.

Respectfully submitted,

/s/ ELLIOT BREDHOFF
Elliott Bredhoff
Michael Gottesman
Bredhoff & Gottesman
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorneys for United Steelworkers of America, AFL-CIO

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257 AMENDMENTS SUGGESTED BY UNITED STEELWORKERS OF AMERICA, AFL-CIO

Amendment No. 1

Change the title to read:

"Sec. 73.123—Personal Attack; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

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Amendment No. 2

Add the following paragraph:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under the Federal Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

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FLORIDA ASSOCIATION OF BROADCASTERS

Gainesville, Florida

4th Floor, Stadium Building

Box 14444—University Station

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RESOLUTION IV

Fairness Doctrine

WHEREAS, the vast majority of broadcast station licensees make conscientious and sincere efforts to comply with the Commission's "fairness doctrine", and such compliance involves both judgment and good faith and is not susceptible to determination by the letter of a rule but only by the spirit of the policy,

THEREFORE, the Florida Association of Broadcasters, Inc., opposes the adoption of the Rules to control personal attacks and political editorializing as proposed in Docket 16574.

Adopted this 21st day of June, 1966 at Jacksonville, Florida.

/s/ ARNOLD F. SCHOEN, JR.,
President

Attest: KENNETH F. SMALL,
Secretary

346 **Memorandum Opinion and Order**

Adopted July 5, 1967; Released July 10, 1967

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger concurring and issuing a statement; Commissioner Wadsworth absent.

1. On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20 and July 5, 1966, respectively (31 Fed. Reg. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), *et al.*,[1] Cape Fear Telecasting, Inc., Colorado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., *et al.*, Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer
347 Broadcasting Co., Trigg-Vaughn Stations, Inc., WIBC, Inc. and WPSD-TV, generally in opposition to the rules. Comments favoring the rules were received

[1] On July 8, 1966 Bedford Broadcasting Corp., *et al.*, submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jesse Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 C.F.R. 1.415(d)).

from the American Civil Liberties Union,[2] Joseph H. Chislow, International Typographical Union (AFL-CIO), Laborers' International Union of North America (AFL-CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL-CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (§ 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of course, pursuant to § 503(b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See par. 10, *infra*.

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 *Report of the Commission in the Matter of Editoriali-*

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[2] The informal comments submitted by the A.C.L.U. reflect an apparent mis-reading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues . . ." In fact this is the situation expressly covered by the proposed rules.

[3] The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, *infra*, within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

zation by Broadcast Licensees, 13 F.C.C. 1246 at 1249 (1949), "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system
348 of broadcasting" *Ibid.* The Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." 13 F.C.C. 1252. The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 *Report, supra,* 13 F.C.C. 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the *Report on Editorialization,* 13 F.C.C. 1246-1270. "We adhere

fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report." *Letter to John H. Norris* (WGCB), 1 F.C.C. 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in *Red Lion*,[4] concluded "that there is no abrogation of the petitioners' [licensees'] free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean* v. *American Public Press, supra* at 249." *Red Lion, supra*, at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules —namely operation by a licensee limited to informing the public of only one side of these issues, i.e., the personal attack or the licensee's editorial.[5]

349

6. The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational FM; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack as-

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[4] *Affirmed sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, Case No. 19,938, D.C. Cir. (June 13, 1967).

[5] In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 *Report, supra*, 13 F.C.C. at 1251.

pect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 F.C.C. 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962). "Thus, we have repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, *with a specific offer of his station's facilities for an adequate response.*' Public Notice of July 26, 1963; Controversial Issue Programming, F.C.C. 63-734 (emphasis supplied)." *Springfield Television Broadcasting Corp.,* 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike & Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4
350 Pike and Fischer, R.R. 2d 681, 685 (1965); *Radio De Land, Inc. (WJBS),* 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra.* Despite such notification and the Commission's rulings, the procedures specified have not always been followed, even when flagrant

personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issues of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do they detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversy or . . . slant or distort the presentation of such news." *Report on Editorialization, supra.*

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. *Capitol Broadcasting Co.*, 2 Pike & Fischer, R.R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

> [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. *Applicability of the*

Fairness Doctrine in the Handling of Controversial Issues of Public Importance, Public Notice of July 1, 1964, footnote 6.

351 Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See *Letter to Pennsylvania Community Antenna Television Association, Inc.*, 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the Notice of Proposed Rule Making, we recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations.[6] As we stated in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of Section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable

[6] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Company's comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist). Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, *supra*. Further, we do not perceive any discouragement to controversial issue programming, except for a licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked.

352 10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond,

rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast licensee. If an unawareness of this obligation presently exists among licensees despite the Commission's language in *Mapoles, Billings, Times-Mirror, Springfield Television,* the Public Notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the one week period. See par. 9, *supra.*[7] This one week outer time limit does not mean that such a copy should not

[7] As we stated in the Notice of Proposed Rule Making, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

be sent earlier or indeed, before the attack occurs,
353 particularly where time is of the essence. Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Commission's interpretive rulings based on specific factual situations.[8]

13. As we pointed out in the Notice, following present policy (Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F.R. 10415 (1964).

14. Finally, subsection (c) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice

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[8] Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in *Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C., supra.* In view of our ruling, this is a matter not covered by the rule.

including, if the licensee so agrees, himself. The language of subsection (c) has been altered from that appearing in the Notice of Proposed Rule Making (FCC 66-291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. See, *Final Report of the Senate Committee on Commerce*, S. Rep. No. 944, 87th Cong., 2d Sess., Part 6, page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have accordingly made this requirement explicit in a proviso to subsection (c).

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16. As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. *Times-Mirror*, 24 Pike & Fischer, R.R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communications Act of 1934, as amended.

18. Accordingly, IT IS ORDERED, that the rules contained in the attached appendix ARE ADOPTED, effective August 14, 1967.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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[9] Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

* See attached statements of Commissioners Bartley and Loevinger.
NOTE: Rules changes herein will be covered by T.S. III(64)-18.

APPENDIX

In part 73 §§ 73.123, 73.300, 73.598 and 73.679 all to read identically are added to read as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candi-

dates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

356 DISSENTING STATEMENT

OF

COMMISSIONER ROBERT T. BARTLEY

The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature.

357 CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER

(Re rule to provide procedure in case of personal attack, etc.)

I concur in the promulgation of a rule specifically providing for the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts, as this seems correct in principle. However, I think that the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation.

358 **Memorandum Opinion and Order**

Adopted: August 2, 1967 Released: August 7, 1967

By the Commission: Commissioners Bartley, Loevinger and Wadsworth absent; Commissioner Cox concurring in the result.

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See Section 315(a) of the Communications Act of 1934, as amended; *Applicability of the Fairness Doctrine In the Handling Of Controversial Issues of Public Importance,* 29 F.R. 10416. Thus, licensees must make good faith, journalistic judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he
359 usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might

impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to *Station WALG,* FCC 65-50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations, discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control

what the public may hear concerning this other side, rather than permitting the person so vitally affected
360 by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., Section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communica-

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[1] For similar reasons, we have exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side, as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the considerations set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

NOTE: Rules changes herein will be included in a revised edition of Volume III.

tions Act of 1934, as amended; see also, Section 1.108 of the Commission's Rules and Regulations.

6. Accordingly, IT IS ORDERED, that the rule revisions contained in the attached appendix ARE ADOPTED, effective August 14, 1967. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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361 APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679 (b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific

Erratum

factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315 (a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

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362 **Erratum**

In the Memorandum Opinion and Order in the above entitled matter, FCC 67-923, released on August 7, 1967, the first sentence of footnote 1. to paragraph 3. is corrected to read as follows:

[1] For similar reasons, we have not exempted news documentaries.

FEDERAL COMMUNICATIONS COMMISSION
/s/ BEN F. WAPLE
Ben F. Waple
Secretary

Released: August 9, 1967

363 **Memorandum Opinion and Order**

Adopted: March 27, 1968 Released: March 29, 1968

By the Commission: Commissioners Bartley and Loevinger dissenting and issuing statements; Commissioner Cox concurring and issuing a statement; Commissioner Johnson concurring in the result.

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (*Radio Television News Directors Assn., et al.* v. *United States,* Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. Such authority was granted by the Court, by order dated March 22, 1968 and this memorandum opinion and order deals with that revision. Since the revision is of a relatively narrow nature[1] and directed only to subsection (b) of Sections 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[2] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and are revising only one portion of it. See *Red Lion Broadcasting Co.* v. *United States,* 381 F. 2d 908 (C.A.D.C.), *certiorari granted,* 88 Sup. Ct. 470.

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[1] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance . . .", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

[2] See Memorandum Opinions and Orders, 8 F.C.C. 2d 721 (July 5, 1967; 32 Fed. Reg. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 Fed. Reg. 11531).

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

364 3. We have consistently sought to promote the fullest possible robust debate on public issues. See Letter to Storer Broadcasting Co., January 31, 1968, FCC 68-120. We have also stated our belief that the fairness doctrine promotes that goal. *Ibid.* CBS does not dispute the latter, but does claim, *inter alia*, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to Section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see Memorandum Opinion and Order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to Section 315 stressed the importance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, new interviews, and news documentaries, and on-the-spot coverage of bona fide news events—from the "equal opportunities" requirement of Section 315, stating that the

fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programming where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1254-55. As the Senate Report (No. 560, 86th Cong., 1st Sess.) stated in 1959, at page 11:

> "It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program."

365 In light of the above two considerations, we have decided to strike the balance in favor of exempting these news program categories, other than the news documentary. Such action avoids *any* possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities."

The fairness doctrine remains specifically applicable to these programs. See Section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st Sess., p. 5; see par. 5, below.

4. We are expanding the exemptions in (iii) of subsection (b) to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[3] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., pp. 83-94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See par. 3, Memorandum Opinion and Order, 9 F.C.C. 2d 539.[4] We note that in this area we have found instances of

[3] We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also. (See, e.g., H: Rept. No. 1069, 86th Cong., 1st Sess., p. 4, as to the legislative history of the term "bona fide news interview."

[4] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266-267).

failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The Section 315 exemption is limited to bona fide news documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect t[illegible] to be the usual practice. See note 4, *supra.*

366 5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc.* (*WRAL*), July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman

to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have re-examined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendment to Section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects.[5]

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[5] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt program categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse

367 7. We have acted here to expand the exemption of program categories further along the lines of the exemption made on August 2, 1967 (FCC 67-923),[6] on the basis of the notice and the comments received in this docket (No. 16574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14):

> "... the public interest should benefit from it. If not, adequate opportunity to remedy it is available."

That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, that the rule revisions contained in the attached Appendix ARE ADOPTED effective April 5, 1968. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Secretary

Attachment

* See attached statements of Commissioners Bartley, Loevinger and Cox.

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of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

[6] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, *supra*), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

NOTE: Rules changes herein will be covered by T.S. III(68)-1.

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * * * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

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369 *Dissenting Statement of Commissioner Robert T. Bartley*

I dissented to the Commission's action of July 5, 1967, adopting these personal attack rules and stated:

> "The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature." (Docket No. 16547)

I hold to that view.

370 *Dissenting Opinion of Commissioner Lee Loevinger*

(Re: Revised personal attack rules)

This proceeding presents the issue whether the so-called "personal attack rules" as now revised by the Commission abridge free speech in violation of the First Amendment to the Constitution. No more important issue, has ever confronted this Commission. I dissent to adoption of the present rules because I believe that the Commission reasoning and procedure throughout this case have been wholly inadequate to the issue and that the rules as now revised are unwise, invalid, and unconstitutional in abridging free speech.

To see this matter in perspective it is useful to review the history of the problem. The Commission first squarely confronted the editorializing issue in Mayflower Broadcasting Corp., 8 FCC 333 (1941). The applicant there was accused of broadcasting "so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy." The Commission held that this was inconsistent with the responsibilities of a broadcast licensee, saying:

"Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate. . . . And while the day-to-day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." 8 FCC 340.

In that case the Commission accepted an affidavit of applicant promising not to broadcast any more "editorials" and renewed its license. The decision was unanimous.

In 1947 the Commission undertook, on its own motion, to review the prohibition against broadcast editorializing; and, after lengthy proceedings, it issued a report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949). Two Commissioners did not participate, one Commissioner issued additional views, one Commissioner issued a separate opinion, and one Commissioner dissented, so the report represented the views of only two, or possibly
371 three, of the seven Commissioners. Nevertheless, that report has continued to be regarded as the authoritative statement of Commission policy in this area up to the present time.

The 1949 report on editorializing cited the Mayflower case, with apparent approval, for the proposition that in the "presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in

the community on the various issues which arise." 13 FCC 1250.

The report said:

> "(E)ditorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesman to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues." 13 FCC 1252.

Without expressly overruling the Mayflower case, the report concluded:

> "(W)e have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest." 13 FCC 1253.

In separate views, Commissioner Jones pointed out that the majority opinion contained no acknowledgement of the applicability of the First Amendment and stated that the Mayflower case was unconstitutional and should be expressly overruled. 13 FCC 1259, *et seq.* Commissioner Jones pointed out that the majority opinion equated "editorialization" with "news" and "comment." Commissioner Jones contended that the First Amendment required that broadcasters be free in this area, and stated that the majority opinion was unduly restrictive and unworkably vague. Commissioner Hennock dissented, contending that the Commission should continue to prohibit editorialization by licensees because the "standard of fairness as delineated in the report is virtually impossible of enforcement . . ." 13 FCC 1270.

The present case started with a Notice of Proposed Rulemaking issued by the Commission April 8, 1966, with Commissioner Hyde abstaining, Commissioner Bartley dissenting and Commissioner Loevinger absent. FCC 66-291. The Notice began by referring to the Fairness Doctrine, citing the editorializing report of 1949 as containing the "basic enunciation of this doctrine." The Notice referred
372 to several cases involving application of the Fairness Doctrine, and stated, "we now propose to codify the procedures which licensees are required to follow in personal attack situations" under the Fairness Doctrine.

On July 5, 1967, the Commission adopted the personal attack rules, in virtually the form previously proposed, with Commissioner Bartley dissenting, Commissioner Loevinger concurring with a separate statement, and Commissioner Wadsworth absent. 8 FCC 2d 721 (1967). The Commission opinion said that the purpose of codifying the personal attack principle in rules was to "clarify and make more precise the obligations of broadcast licensees," and to enable the Commission to "impose appropraite forfeitures . . . in cases of clear violations by licensees . . ." The Commission opinion also said, "These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine." The 1949 editorializing report was cited and a footnote added, "The only new requirement in these rules are [sic] the time limits . . ."

On August 2, 1967, the Commission, *sua sponte*, adopted a further "clarification" of the recently codified personal attack rules, Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. 9 FCC 2d 539 (1967). The amendment made the rules inapplicable

> "to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be ap-

plicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events.)"

The rules as thus formulated and adopted were attacked in the cases now pending in the Court of Appeals for the Seventh Circuit by the Radio Television News Directors Association, the networks and others. CBS filed a brief (in case no. 16,498) contending that the rules unconstitutionally abridge free speech and violate the Communications Act. The thrust of the argument was that the rules illegally burden the discussion of controversial issues of public importance in news analysis, news interviews, and news documentary programs. The brief was accompanied by an exhibit setting forth verbatim transcripts of some 31 commentaries by Eric Sevareid, some 34 extracts from the news interview series Face the Nation, and excerpts from 6 CBS news documentaries.

The CBS brief and accompaning exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation. The Commission, therefore, instructed its legal counsel to seek permission in the Court of Appeals to amend the rules further, and, pursuant to such permission, has now adopted another amendment to the rules.

373 I dissent to the present action of the Commission for several reasons. First, the amendments now adopted, like the preceding rules, have been inadequately considered and are badly drafted. Second, the amendments are unreasonably and unconstitutionally vague. Third, the amendments will impose more regulation and a greater burden on the free expression of ideas and news than the rules without the amendments. Fourth, I have come to doubt the competence of a Government agency such as the

Commission to promulgate and administer rules such as these in the area of speech.

The first point is almost self-evident. The tortuous and changing course of the Commission with respect to the present rules is evidence of the inadequacy of research and consideration underlying the rules. Despite the lengthy period these rules have been pending since their proposal by the Commission, there has yet been no consideration of the numerous analogous and relevant statutes and precedents in other jurisdictions. More than 20 years ago the Commission on Freedom of the Press recommended:

> "As an alternative to the present remedy for libel, we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply." Chafee, Government and Mass Communications (1947) 801.

The problems involved in "personal attacks" on groups and individuals, and the various methods of dealing with such problems, including the "right of reply" statutes which had been enacted in numerous states and some foreign countries, were extensively discussed by Professor Zechariah Chafee, Jr., in 1947. Chafee, Government and Mass Communications (1947) pp. 77-195. More recently, there have been a number of scholarly published discussions of the policy, constitutionality and legislative background of the Fairness Doctrine. See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, the FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (Feb. 1968).

None of this material, the sources from which these discussions are derived, or the underlying facts or authorities,

has been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language.

374 The opinion and version of the rules now adopted by the Commission has been hastily drafted, has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the cases now pending in the Court of Appeals. Regardless of the formal requirements of the Administrative Procedure Act, elementary principles of intellectual discipline require more than this for rational decision of an important problem. It is dubious whether the course followed here is ever warranted. It is clear that this procedure is wholly inadequate when we are dealing with First Amendment issues, involving, as they do, the most fundamental of our constitutional principles.

In the second place, the rules now adopted are intolerably and unconstitutionally vague. The rules as amended August 2, 1967, applied to "editorial or similar commentary" included in newscasts and similar programs. The substance of the present revision is to move "similar commentary" from the category of inclusion in the rules to the category of exclusion, leaving "editorials" in the rules. Thus, the rules as now revised apply to "editorials," whether or not included in newscasts or news programs; do not apply to "commentary or analysis" included in newscasts or news programs; yet may apply to "commentary or analysis" in some circumstances.

The distinction between "editorials" and "similar commentary" not only defies definition but is completely in-

consistent with all that the Commission has previously said on this subject. In the 1949 report on editorializing, which is still cited as the basic authority on this subject, editorializing is said to include the "presentation of news editors and commentators." The opinion on adoption of the present rules said that they made no change in substantive principles but merely codified existing precedents and added time limits. The present opinion offers neither rationale nor criterion for distinguishing between "editorials" and "commentary." Far from giving any enlightenment on this subject, the present opinion appears to be merely a random collection of words and phrases from earlier Commission opinions expressing the Commission's faith in robust discussion and regulation. Ever since the Mayflower case the Commission has continued to use the language and vocabulary of free speech to justify the regulation and restriction of broadcast speech. It is significant that the Commission has not yet explicitly repudiated the Mayflower opinion or the Commission power asserted there; and the Commission has never attempted to analyze, or even examine, the limitations on its own power flowing from the First Amendment. On occasion the Commission has suggested that, and it has often acted as though, the First Amendment imposed no limitation on Commission power. See
375 Loevinger, Religious Liberty and Broadcasting, 33 Geo. Wash. L. Rev. 631, 654, footnote 101. So the history of the Fairness Doctrine and the Commission opinions relating to it add confusion and obscurity rather than specificity or clarity to the opaque and unintelligible meaning of the present revision of the second clarification of the first clarification of the personal attack principle of the general Fairness Doctrine.

I have reviewed all of the Sevareid commentaries presented in the CBS Exhibit to its brief and am quite unable to determine whether any one of them is an "editorial" or "commentary" within the meaning of the rules. It would

seem that this exercise should have been undertaken before any revision to the rules was drafted; but, as pointed out above, the course followed here allowed no such precautions or efforts. It is clear that up to the moment of adoption of the present revision of the rules the Commission regarded "editorials" and "commentaries" as being synonymous. The present rules not only differentiate between these terms but make the application of the rules themselves turn upon that differentiation. This is clearly contrary to the mandate of the Constitution as construed by the Supreme Court.

The Supreme Court has said:

> "(S)tandards of permissible statutory vagueness are strict in the area of free expression * * *"
>
> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual applications of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
>
> "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

N. A. A. C. P. v. [redacted]*utton,* 371 US 415, 432-433, 438 (1959). To the same effect are *Smith* v. *California,* 361 US 147, 151 (1959); *Cramp* v. *Board of Public Instruction,* 368 US

278, 287 (1961); *Ashton* v. *Kentucky*, 384 US 195 (1966); *Keyishian* v. *Board of Regents*, 385 US 589 (1967).

As I have previously pointed out, the proscription of statutory vagueness in this field applies at least as
376 strongly to administrative rules as to statutes. *F.C.C.* v. *American Broadcasting Co.*, 347 US 284 (1954); *Bridges* v. *California*, 314 US 252 (1940); *Anti-Defamation League of B'nai Brith*, 6 FCC 2d 385, 393, 395 (concurring opinion of Commissioner Loevinger). It therefore appears that the present rules are void for vagueness.

However, there is a third and greater vice in these rules. This is that the rules as now revised will limit and burden speech to a degree that makes broadcast expression of views subject entirely to the whim of the Commission or its staff.

It is clear from the circumstances of adoption of the present revision, and will not be controverted by the Commission, that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS Exhibit to its brief. Much of the force of the CBS argument derives from the great respect which the Commission, its lawyers and the public have for Eric Sevareid. It would not be inappropriate to call the present revision of the rules the "Eric Sevareid rule." Certainly it is the intention of the Commission to exempt the Eric Sevareid commentaries from its personal attack rules.

However, the Commission cannot draft or apply rules that operate on the basis of its attitude toward particular individuals. If the commentaries of Eric Sevareid are entitled to exemption from the rules, then so are the commentaries of Richard Cotton, Carl McIntire, and a host of other lesser commentators. This does not imply that Eric Sevareid is comparable to other commentators in any respect other than that of being a commentator. But that

is all we are entitled to consider under the law. I yield to no man is my respect for Eric Sevareid. But I think I know Eric Sevareid well enough to assert that he would neither seek nor approve a rule which exempted him from regulatory requirements of the Commission while subjecting commentators with other views to such regulatory requirements.

The effect of the vagueness and lack of definition or criterion in the revised rules is that there is simply no means of ascertaining what may be considered a "commentary" and what may be considered an "editorial." The result is going to be that opinions which the Commission, or, more often, its staff, finds pleasing or tolerable will be called "commentaries" and exempted from the rules, while opinions which the Commission or its staff finds unpleasant or intolerable will be called "editorials." There is no principle involved in this distinction and not even an attempt to provide a verbal facade to mask the arbitrary choice which the Commission reserves to itself in categorizing broadcast expression of views on current topics as "commentary" or "editorial." Thus, under the revised rules the Commission and its staff would have the untrammelled power to say that any broadcast expression of views or analysis related to any matter of current interest is either subject to these rules or not
377 subject to these rules. Unless the Commission grants blanket exemptions to commentators by name, no commentator will know from one broadcast to the next whether his comments are subject to the rules or not. The Commission and its staff will be involved in an endless series of rulings as to the status of individual broadcasts, and every newscaster and commentator will operate in constant peril of being declared under the rules, and therefore subject to penalties, without any means of knowing in advance what the status of a particular broadcast will be. Such uncertainty and arbitrary power will be even greater

burdens on broadcasters than those which CBS presented in persuading the Commission to adopt the present revision.

Further, the present rules will be greater burdens on free speech than those which the Supreme Court has found in other cases to be unconstitutional. The personal attacks which come within the present rules are not merely the kind of vicious verbal assaults suggested by the term "attack." On the contrary, even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an "attack" under the present rules. (Numerous examples are set forth in the CBS Exhibit.) Consequently whenever there is a broadcast statement of fact or opinion that may reflect adversely on any individual or group the broadcaster must either determine that the statement is within one of the exemptions to the rule (such as exempt "commentary") or follow the precise procedure prescribed by the rule as to notification and offering time to reply. If the broadcaster guesses wrong on this—that is, if his judgment differs from that of the Commission or its staff —then he is subject to forfeitures which may aggregate $10,000 or to revocation or denial of renewal of his license. Such penalties are considerably more severe than those involved in cases such as *Terminiello* v. *Chicago,* 337 US 1 (1949), where free speech was held unconstitutionally burdened by an ordinance providing fines of $100 to $200.

The Commission will, of course, strongly and sincerely protest that it will not enforce these rules in a crude or oppressive manner, that whether a statement is held to be a "commentary" exempt from the rules or an "editorial" subject to the rules will not depend upon the Commission or staff approval or disapproval of the views expressed, and that only "flagrant" violations of the rules will be subject to penalties. But constitutional rights, particularly in the field of free speech, cannot be made dependent on the good-will, self-restraint or discretion of administrative

officials. *Cantwell* v. *Connecticut,* 310 US 296 (1940); *Bantam Books* v. *Sullivan,* 372 US 58 (1963).

Thus I come to the fourth reason to dissent to adoption of the revised rules, which is that they give the Commission greater power to influence or control the expression of ideas than should be given to any Government agency.

378 In the case of Brandywine-Maine Line Radio, decided by the Commission March 19, 1968, FCC 68-298, I dissented from the refusal of the Commission to suspend proceedings in a case involving application of the personal attack principle of the Fairness Doctrine pending determination of the Commission position in the present proceedings. The event has justified my position, for the Commission has either substantially changed the scope and application of the personal attack principle or rendered its application uncertain and arguable in many common situations or both. The concurring opinion in that proceeding suggests that there may be some inconsistency in the fact that I "originally endorsed" the personal attack rules, but now "regard [the rules] with distaste." The point is worth explanation.

When the personal attack rules were adopted I concurred, stating that "the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts . . . seems correct in principle." My opinion added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation." Events since then, including the several revisions which the Commission has made in the rule, certainly demonstrate that the latter judgment was entirely correct. But there is a more important point.

When the rule was adopted I thought that the "right of reply" for a person unfairly attacked or wronged in a broadcast or publication was a wise and just principle

if embodied in a clear and practical statement. I am still of that opinion. However, I have come increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly. It is neither necessary nor appropriate to attempt to show that the Commission has been unwise or unjust in its regulatory actions in this area. It is enough to say that there are serious doubts as to the wisdom and justness of its actions. Let us note only recent examples.

The Commission initially ruled that the Fairness Doctrine was applicable to cigarette advertising after receiving a single letter of complaint and without notifying the station, examining any of the advertisements, or permitting or receiving any response to the complaint. See 9 FCC 2d 921, 952, 953 (1967) (concurring opinion).

In the KING cases the Commission undertook to judge precisely the amount and distribution of response time that was adequate or inadequate for a candidate who was not attacked but whose opponent was endorsed in broadcast editorials. See FCC 67-1194; 67-1049; 11 RR 2d 628 (1967); and footnote 34 at pages 27-28 of the CBS Brief.

379 In the Brandywine-Main Line case, cited above, a licensee was in hearing on an application for renewal of its license with a principal issue being compliance with the personal attack principle of the Fairness Doctrine. After the Commission moved the Court of Appeals for permission to revise that principle (or the Commission's interpretation or codification of that principle), the Commission refused to suspend the Brandywine-Main Line hearing long enough to permit the parties there to learn what the Commission's revised version of the personal attack principle might be. Thus the Commission in effect held that the personal attack principle should mean one thing in proceedings then pending before it but something

else in the court cases in which the Commission is defending the validity of that principle.

In the present matter the Commission's changeable, erratic and confusing course in its efforts to codify and clarify its own uncertain precedents demonstrates an absence of such consideration, skill and precision as is required in this area.

Perhaps it is inherent in the institutional administrative process, particularly of agencies burdened with the overwhelming volume of the FCC, that the scope of consideration will be limited, specialized and parochial and the skills will be technological. See Loevinger, The Administrative Agency as a Paradigm of Government, 40 Indiana L.R. 287 (1965). If so, that cannot serve to validate unwise or unconstitutional policies. But it does warn that such agencies are not the appropriate bodies to formulate rules of social policy; and that they should regulate only within the fields of their specialized technical competence.

Certainly in the area of First Amendment freedoms doubts should be resolved against the existence or exertion of government power to control. It seems to me that it is peculiarly inappropriate for an administrative agency to make rules creating or extending its own power in the area of First Amendment freedoms. Here, more than elsewhere, the creation or delegation of power and the formulation of rules should be by elected legislative bodies, with only enforcement and application left to administrative agencies. The Commission course with respect to these rules argues strongly against the wisdom of their adoption. The rules as revised seem clearly to burden, and thus abridge, free expression through the broadcast media. In case of even arguable conflict between administrative action or power and First Amendment protections I will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms.

I join fully in the majority opinion in this matter, but believe it desirable to comment on certain of the statements in Commissioner Loevinger's dissent. Due to the pressure of time I will touch on only a few of the points he tries to make—there are others which are either inaccurate or irrelevant, but which cannot be treated adequately in the time available.

On page 3 of his dissent,[1] Commissioner Loevinger asserts that "The CBS brief and accompanying exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation." I do not think this is true. Since this assertion purports to analyze and characterize the mental processes of others on the basis of discussion in a Commission meeting which was confidential and closed to the public, I believe it inappropriate to comment further, except to say that I know of no basis for this statement. The grounds for our action are clearly set forth in our opinion, which points out that we do *not* believe that the personal attack rule, as originally drawn, inhibited free discussion or was otherwise invalid, but concludes that we should make a minor revision in the rule to parallel Congressional policy in the 1959 amendments to Section 315 of the Communications Act, thereby removing any possible claim of inhibitory effect in the vital news areas favored by Congress and in which no pattern of abuse has developed. Commissioner Loevinger's effort to confess error for the majority of his colleagues is not only without factual basis, but is also presumptuous. He is free to discuss the facts involved

[1] The page references used herein have reference to the typewritten version of the dissent available at the time of preparation of this opinion.

in the pending litigation and to set forth his view of the applicable law. But I do not think he can give aid to the parties challenging the Commission's rule by publicizing an inaccurate version of the views of other Commissioners and members of our staff expressed in the discussions leading up to the official action reflected in our opinion.[2]

381 Commissioner Loevinger first argues (page 4) that the amendments the majority have adopted "have been inadequately considered and are badly drafted." As I noted in my earlier concurring opinion in this matter, I do not recall that he offered any suggestions for revision of the form of the rule adopted on July 5, 1967.[3] Instead, he concurred in the adoption of the rule but added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical application." I don't know quite what that meant, but it has served as a handy escape hatch now that Commissioner Loevinger has changed his mind about the feasibility of regulating personal attacks by rule. Perhaps because of that, he has not made a single suggestion for improving the form of the revised rule we have now adopted. He likes to complain of the poor quality of draftsmanship displayed by all of the rest of us, but is chary about contributing to improved performance of our duties in this area.

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[2] As I have indicated before [Public Notice of March 1, 1968, Mimeo No. 13493, concurring statement] I did not originally favor revising the rule, because I think that it is valid in the form before the Court and that it would not inhibit freedom of speech or journalistic expression by qualified and effective licensees. Indeed, while I concurred in the modification of the rule last August, I did not believe it necessary or completely desirable. I have always believed that fairness in the personal attack field is best served by a prompt and willing offer of time to reply, and believe that this not only is fair to the person attacked but also permits licensees to present any material they consider in the public interest—except for the well recognized exceptions of obscenity, incitement to riot, etc.

[3] 8 FCC 2d 721.

Commissioner Loevinger says we have followed a "tortuous and changing course" with respect to this rule. It is true that we have twice modified the rule, but always in the same, consistent direction and for the sole purpose of removing any possible grounds for concern that the rule would inhibit freedom of speech in the area of broadcast news. The rule adopted in July 5, 1967, provided, in substance, that when, in discussion of a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a specified time, transmit to the person or group attacked a notice of the broadcast, a script, tape, or summary of the attack, and an offer of time to respond. Exceptions were made for attacks on foreign groups and public figures and for attacks on candidates or their associates by other candidates or their associates.

On August 2, 1967, we amended the rule on our own motion to provide an additional exemption for bona fide newscasts and on-the-spot coverage of bona fide news events.[4] As is true of all the exceptions provided for in the rule, the general Fairness Doctrine remains applicable. That narrowing of the applicability of the rule itself was designed—like the change now being made—to eliminate any possibility that our rule "might impede the effective execution of the important news functions of licensees or networks." We indicated at that time that the added exemption did not extend "to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts." We have now decided that commentary within newscasts and the other exempted news formats should also be excluded from the rule—though still subject to the Fairness Doctrine—but have again con-

[4] 9 FCC 2d 539.

cluded that the licensee's editorials should be subject
382 to the rule. In formulating our August 2, 1967, revision we also considered news documentaries and news interviews but decided not to take them out of the rule. We have now reconsidered and are acting to exempt news interviews, while still leaving news documentaries subject to its requirements. We said, in our Memorandum Opinion and Order of August 2, 1967:

> "It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires."

We have now done just that. We have not moved erratically, but in a single coherent direction, to meet the concerns of responsible people that the rule might inhibit broadcast journalism. While I do not fully agree that those concerns were valid, I think that the effort to eliminate any possible inhibitory effect is commendable.

Commissioner Loevinger cites certain published commentaries on freedom of the press and on the Fairness Doctrine,[5] and then says:

> "None of this material, the sources from which these discussions are derived, or the underlying facts or

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[5] He refers to three articles on the Fairness Doctrine. Prof. Kalven's paper "is largely based on a memorandum written a year ago for the Columbia Broadcasting System." CBS is one of the parties challenging our personal attack rule. Prof. Robinson was one of the participants in a panel discussion before the House Subcommittee on Investigations, while Mr. Manelli is a member of that Committee's staff. Toward the end of the two-day consideration of Fairness and Section 315, Representative William L. Springer, ranking minority member of the full Committee on Interstate and Foreign Commerce, is quoted as saying "I don't believe anyone on this Committee favors abolishing the fairness doctrine." See *Television Digest*, Vol. 8, No. 11, March 11, 1968.

authorities, has [sic] been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language."

I do not think that this is true. Commissioner Loevinger is again attempting to characterize the processes by
383 which others have reached conclusions with which he now disagrees—though he has not in the past. We have a competent legal staff to advise us on these matters, and some of the rest of us try to keep up with relevant commentary to the extent our attention to other duties permits. We have tended to rely substantially on our own experience, as reflected in our decisions disposing of specific Fairness complaints—in most of which Commissioner Loevinger joined.

Specific attention must be given to the sentence at the top of page 5 of Commissioner Loevinger's opinion to the effect that this revision of the rule "has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the Court of Appeals." While it is true that our consideration of this matter had to meet the Court's schedule,[6] this important action was fully discussed by the Commissioners, after substantial basic staff work. I do not presume to speak for my colleagues, but I know I gave the matter most careful attention, going

[6] I have already addressed myself to Commissioner Loevinger's charge that we are simply trying to improve our posture in Court. See item referred to in Note 2, *supra*.

over it several times with different elements of our staff and suggesting changes in the language proposed. As for acting without further Notice of Proposed Rulemaking, our reasons are set out in Note 6 in the majority opinion. Commissioner Loevinger never pressed for such notice and, indeed, fully subscribed to the desirability of the procedure we have followed, which will facilitate the earliest possible review of this important matter by the Court.

Commissioner Loevinger's second argument is that the rule is now unconstitutionally vague. On pages 5 to 7, he asserts that it is impossible to differentiate between "editorials" and "commentary". I think the difference is clear.

It is true that the 1949 Report on Editorializing by Broadcast Licensees said:

> "11. It is against this background that we must approach the question of 'editorialization'—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms
> ranging from the overt statement of position by the
> 384 licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public

interest, is not identical with the broader problem of assuring 'fairness' in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem."

• • •

"13. The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such is consonant with the operation of their stations in the public interest, resolves itself, primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such over-emphasis on the side of any particular controversy which the licensee chooses to espouse as to make impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest."[7]

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[7] 13 FCC 1246, at p. 1252 (1949). The Commission thus tacitly reversed the ultimate holding in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), while continuing to cite it with respect to the basic requirement of Fairness. Contrary to Commissioner Loevinger's charge, the Commission expressly considered "the limitations on its own power flowing from the First Amendment" in the Editorializing Report, and stated: "We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the first amendment." We have often considered the matter since then. *Pacifica Foundation*, 36 FCC 147 (1964). *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190 (1966), 6 FCC 2d 385 (1967). I do not think we have taken any action violative of the First Amendment.

I think this recognizes a distinction between editorialization in general—the injection of the licensee's
385 opinions in program matter—and editorials—discrete program elements clearly presenting the licensee's opinions as such, which the Report calls "overt editorialization." In the years since this distinction has become quite clear and is generally understood in the broadcast industry. Thus *Editorializing on the Air*, 2nd edition, 1962, prepared by the Committee on Editorializing of the National Association of Broadcasters, defines editorials as follows:

> "A broadcast editorial is an on-the-air expression of the opinion of the station licensee, clearly identified as such, on a subject of public interest."

I do not think, therefore, that broadcasters will have the difficulty with this distinction which Commissioner Loevinger does. As he himself correctly points out, "the rules as now revised apply to 'editorials,' whether or not included in newscasts or news programs; do not apply to 'commentary or analysis' included in newscasts or news programs; yet may apply to 'commentary or analysis' in some circumstances." I would only add, by way of clarification, that the rule *is* clearly applicable to commentary or analysis not included in any of the three exempt news type programs.

The Commission is here exempting all commentary or analysis *in* newscasts or other exempt programs, since such commentary or analysis is an integral part of the news function; it can, for example, occur at any point in a newscast and, indeed, the trend is more and more toward such "in depth" presentation of the news. What is not exempt is the *labelled editorial of the licensee*. To put it in terms of the situation of CBS, as Commissioner Loevinger does, the commentary and analysis of Walter Cronkheit and Eric Sevareid in newscasts are exempt, but the presenta-

tion by a network official, or by an announcer, of the editorial opinion of CBS is not. No real problem of differentiation is presented, and the reasons for the different treatment are set out in the majority opinion. I think that there is a great difference, in terms of the policy considerations with which we are dealing, between presentation of the news, in all its forms, and the labelled editorial opinions of the licensee. Finally, our revision does not turn on Eric Sevareid or any other particular person, though it is useful to discuss the issue in such personalized terms. Rather, our changes in the rule are based on the same considerations that moved Congress to amend Section 315 of the Act in 1959, and our action extends to all these news programs without regard to the individuals who may be involved in presenting them.

Commissioner Loevinger's third objection to the revised rule is that it "will limit and burden speech to a degree which makes broadcast expression of views subject entirely to the whim of the Commission or its staff." If I thought that were true, I would be as concerned as he is—but it isn't. I do controvert his contention "that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS
386 Exhibit" if, as seems to be the case, he uses the word "kind" to refer to the character or quality of such commentary. While I greatly admire Eric Sevareid, this is no "Sevareid rule". Mr. Sevareid's commentary will be exempt from the rule only so long as it is contained within a bona fide newscast, a bona fide news interview, or on-the-spot coverage of a bona fide news event.

Thus there will be no difficulty in identifying editorials—they are the broadcast expression of a licensee's opinion, usually identified as such. I am sure Mr. Sevareid quite clearly understands that he is not expressing the official opinions of CBS. As for commentary, it will be classified not according to the identity of the commentator or the

Commission's agreement or disagreement with his views, but according to the nature of the program in which it is presented. The Commission will have no "untrammelled power" and commentators and licensees will have no such difficulties as Commissioner Loevinger envisions.

On page 8, Commissioner Loevinger contends that the present rule imposes a great burden on freedom of speech because "even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an 'attack' under the present rules." First, the present rules makes no change in this respect from our long established policy going back many years. Commissioner Loevinger voted for the July 26, 1963 Public Notice which referred to the present attack principle in precisely the terms now in the rule.[8] Further, the concept of a personal attack is appropriately delineated. The rule does not come into play merely because a statement is made adversely reflecting on a group or individual. There must be a personal attack which makes the integrity, honesty, character or like personal qualities of the person or group an issue in the discussion of some controversial issue of public importance. Contrary to Commissioner Loevinger's suggestion, almost all of the examples set out in the CBS Exhibit are not personal attacks under the rule and do not raise any significant question in that respect. The Commission thus has been at pains to state that there can be vigorous disagreement with someone's views without bringing into play the personal attack rules. Indeed, I believe the *Pennsylvania Community Antenna Television* case, 1 FCC 2d 1610, cited in our first opinion, constitutes

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[8] FCC 63-734. See also letter to John H. Norris, (Red Lion Broadcasting Co.), 1 FCC 2d 1587; Letter to Allen Woodall (Radio Albany, Inc.) FCC 65-50; Letter to Warren Zwicky (Storer Broadcasting Co.), January 31, 1968, FCC 68-120. In all these rulings Commissioner Loevinger joined in finding a violation of the personal attack principle stated in exactly the same terms as here.

387 the short answer to Commissioner Loevinger on this score. Finally, Commissioner Loevinger is simply wrong in his assertion that if the broadcaster "guesses wrong" on the various facets, he will be fined. This is contrary both to our consistent statements and actions. See Letter to Roy Barthold (Station KUHT), January 31, 1968, FCC 68-121; Letter to L. E. White, Jr., January 31, 1968, FCC 68-122; Par. 9, Memorandum Opinion and Order, July 5, 1967, 8 FCC 2d 724.

Commissioner Loevinger's fourth reason for dissenting is that the revised rule "give[s] the Commission greater power to influence or control the expression of ideas than should be given to any Government agency." But this depends, of course, on his earlier conclusions that the rule is unconstitutionally vague and will subject broadcast expression of views entirely to the whim of the Commission. As indicated above, I think both of these are clearly erroneous.

While Commissioner Loevinger says that he still thinks the "right of reply" is a just principle if embodied in a clear and practical statement, he indicates that he has come "increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly." As indicated before, he has not sought to help us formulate such a statement of the principle.

On page 9, he cites two recent Commission actions as indicating serious doubt as to the wisdom and justice of our administration of the Fairness Doctrine. The first, our cigarette advertising rulings, need no special defense from me. Indeed, Commissioner Loevinger joined in both actions—without comment as to our letter of June 2, 1967 to WCBS-TV, and with a concurring statement attached to our Memorandum Opinion and Order of September 8, 1967, in which he seems to say that he doubts the legality

of our action but nonetheless concurs in it. The second, the *KING* cases, far from supporting Commissioner Loevinger, demonstrate the wisdom of our rules. In the first *KING* case, the station presented a series of 30 20-second editorials endorsing five candidates for office and offered each disadvantaged candidate 2 one-minute periods for reply. I have, of course, no quarrel with its right to editorialize in this way. But the station's offer to a rival candidate of only 2 one-minute spots, while it involved a reasonable total time (120 seconds), was clearly unreasonable in its disregard of the significance of the number of repetitions. The second *KING* case was similar in principle, again demonstrating that the public—and certainly the candidate involved—benefited from the application of our rule to require fair exposure of the responses to the station's numerous editorials.

On page 10, Commissioner Loevinger refers to our action in the *Brandywine Main Line* case, where we refused to suspend the hearing pending issuance of this revision of the personal attack rule. But there were several other issues in the case beyond any personal attack issues, and, as to the latter, only a narrow rule revision was contemplated which did not appear to affect the hearing in
that case. See Commissioner Johnson's concurring
388 statement in connection with that ruling. In fact,
our revision is of a narrow nature which cannot affect that case. Again, therefore, I believe that the Commission acted reasonably. Certainly we have not changed the underlying personal attack principle which applies in that case.

Finally, Commissioner Loevinger states, page 10, that he "will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms." I fully agree with that purpose. Indeed, the basis of our present revision of the rule is a desire to avoid *any* possibility of

inhibiting robust, wide-open debate over the air. But my difference with Commissioner Loevinger is that, unlike him, I strongly believe that the Fairness Doctrine, including the personal attack facet, promotes the First Amendment freedoms, rather than restricting them. And I think his abandonment of any effort to maintain fairness in broadcast treatment of controversial issues simply because "arguable conflict" between the First Amendment and our regulatory action is urged by partisan interests leaves the public without needed protection. We are not creating or extending our own power—we could not if we wished to do so. We are simply pursuing policies developed over the years which contribute significantly to the democratic dialogue.

Joint Petition to Review

[Filed July 27, 1967]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Joint Petition To Review an Order of the Federal Communications Commission

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioners present this joint petition for review of a final order of the Federal Communications Commission, FCC 67-795, released July 10, 1967, and in support thereof state as follows:

1. This petition is filed pursuant to 28 U.S.C. §§ 2341 *et seq.* (1966); Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and 5 U.S.C. §§ 702-704 (1966).

NATURE OF THE PROCEEDINGS

2. The Federal Communications Commission (hereinafter Commission) has asserted for a number of years its so-called "fairness doctrine" as an obligation of broadcast station licensees in their programming with regard to controversial public issues. Although its terms have been varied considerably at different times, the fairness doctrine requires in substance that whenever a radio or television station broadcasts a program discussing a controversial issue of public importance it must provide a reasonable amount of broadcast time for the presentation of conflicting views. The fairness doctrine has been the subject of policy statements and individual rulings by the Commission.

3. On April 6, 1966, the Commission issued a Notice of Proposed Rule Making (FCC 66-291) in which it proposed for the first time to codify in a regulation two phases of its fairness doctrine. A station which violates a Commission regulation becomes subject to revocation or nonrenewal of its station license, issuance of a cease-and-desist order and civil forfeitures (47 U.S.C. §§ 312, 502). The proposed regulation set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue. In cases of editorial endorsement of political candidates, a broadcast station would be required to give notice within 24 hours (or advance notice if the editorial is broadcast within 72 hours of election day) to other candidates for the same office, to provide such candidates with a script or tape of the editorial, and to offer broadcast time over the station's facilities for a response by spokesmen for such candidates. In "personal attack" cases, similar notice

and opportunity to respond would have to be afforded the group or person attacked.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups, including these petitioners. In their detailed comments, petitioners contended, *inter alia*, that the proposed regulation (and the fairness doctrine of which it is a part) restricted the free conduct of journalistic functions by broadcasters in violation of the freedom of the press guaranteed by the First Amendment. Petitioners pointed out that in the context of journalistic media other than broadcasting a "fairness" requirement would clearly violate the First Amendment and that no valid basis exists for distinguishing between broadcasting and other media. Petitioners submitted evidence to show that the effect of the fairness doctrine is to restrict the presentation of programs concerning controversial public issues and to reduce the amount of such programming.

5. On July 10, 1967, the Commission released a Memorandum Opinion and Order (FCC 67-795) adopting, effective August 14, 1967, the proposed regulation. The Commission, among other things, rejected petitioners' constitutional contentions. (A copy of the Commission's Memorandum Opinion and Order is attached as Exhibit A hereto.)

FACTS UPON WHICH VENUE IS BASED

6. Petitioner Radio Television News Directors Association (hereinafter RTNDA) is an unincorporated association of more than 1,000 news directors, news executives and other news personnel employed by radio and television stations or networks in the United States and Canada. It is authorized to represent its members in matters relating to the improvement of radio-television news services and freedom of information. RTNDA has its principal

office in Chicago, Illinois. The other petitioners are eight corporations which are licensees of radio and television stations located throughout the United States. Among the corporate petitioners, Bedford Broadcasting Corporation has its principle office in Bedford, Indiana; Central Broadcasting Corporation in Richmond, Indiana; and Marion Radio Corporation in Marion, Indiana.

7. Petitioners are "aggrieved" and "adversely affected" by the Commission's Order (FCC 67-795), within the meaning of 28 U.S.C. § 2344 and 5 U.S.C. § 702. The members of RTNDA will be hampered and restricted in the performance of their professional duties by reason of the regulation which is adopted by the Commission's Order. The other petitioners, as station licensees, are hampered and restricted by the instant regulation in their presentation of programs concerning controversial public issues and editorials endorsing or opposing political candidates. The regulation denies to each of the petitioners the freedom of speech and of the press guaranteed by the First Amendment. Unless the Commission's order is judicially reviewed at this time, petitioners will be compelled either to comply with a regulation which unconstitutionally interferes with their day-to-day performance of journalistic functions in the operation of radio and television stations, or, by failing to comply, to risk revocation or non-renewal of their station licenses, civil penalties, cease-and-desist orders, or (in the case of RTNDA members) loss of employment. Each petitioner was a party to the proceedings before the Commission.

GROUNDS UPON WHICH RELIEF IS SOUGHT

8. The Commission's order (FCC 67-795) and the regulation which it adopts are unlawful for each of the following reasons:

(a) The order and regulation violate the First Amendment to the U. S. Constitution.

(b) The order and regulation violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits program censorship by the Commission.

(c) The statutory provisions upon which the Commission relied in promulgating its order and regulation are unconstitutionally vague and imprecise as a basis for regulating conduct in the area of First Amendment rights.

(d) The Commission's regulation is itself too vague and imprecise to serve as a basis for regulating conduct in the area of First Amendment rights.

(e) The asserted statutory authorization for the Commission's regulation lacks the explicitness necessary to support agency action in an area of doubtful constitutionality.

RELIEF PRAYED

WHEREFORE, petitioners pray:

(1) that copies of this joint petition be served upon respondents and that the record upon which the Commission's final order here in question was entered be filed by the Commission in this Court, in accordance with 28 U.S.C. §§ 2344, 2346;

(2) that this Court review the Commission's order (FCC 67-795);

(3) that upon such review this Court set aside the Commission's order;

(4) that this Court declare invalid the Commission's regulation here in issue on the grounds that it is unconstitutional, unauthorized by law and violative of Section 326 of the Communications Act of 1934, 47 U.S.C. § 326; and

(5) that petitioners be granted such other relief as the Court may deem proper.

Respectfully submitted,

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Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this petition for judicial review of a final order of the Federal Communications Commission (hereinafter the Commission) and avers as follows:

I.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Petitioner owns and operates, pursuant to license from the Federal Communications Commission, television station WCBS-TV and radio stations WCBS and WCBS-FM in New York City, as well as television and/or radio stations in Boston, Chicago, Los Angeles, Philadelphia, St. Louis and San Francisco. Radio and television stations owned and operated by Petitioner regularly carry news broadcasts and other programs involving discussion of issues of a controversial nature. Some of these stations also carry editorials endorsing candidates for political office. Petitioner also owns and operates a television network and a radio network, not licensed by the Commission, which furnish programs—including news and public affairs programs—daily to several hundred broadcast stations. Petitioner seeks review of an order of the Commission

entered in proceedings entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, and released July 10, 1967, attached hereto as Appendix A).

2. These proceedings were initiated on April 6, 1966, by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposal included provisions purporting to codify the "personal attack" and "political editorial" branches of the Commission's "fairness" doctrine. Comments were filed by Petitioner and others in opposition to the proposed rule, while other parties favored its adoption.

3. The proposed rule was attacked on various grounds: as an unconstitutional restraint on free speech, as beyond the Commission's statutory authority, and as contrary to the public interest and general regulatory policies of the Commission. In the Memorandum Opinion and Order under review the Commission rejected the objections of Petitioner and others, and adopted the Rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Loevinger concurred in a separate opinion, and Commissioner Bartley dissented. Commissioner Wadsworth was absent. As authority for the adoption of the Rule, the Commission invoked Sections 4(i), 4(j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

4. The order under review amends Part 73 of the Commission's Rules (47 C.F.R.) by adding four identical sections (§§ 73.123, 73.300, 73.598 and 73.679) applying respectively to standard broadcast stations, FM broadcast stations, noncommercial educational FM broadcast stations, and television broadcast stations. Subsection (a) of the Rule provides that when, "during the presentation of

views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must within a week notify such person or group of the broadcast, furnish a script, tape or accurate summary of the "attack," and offer such person or group "a reasonable opportunity to respond over the licensee's facilities." Subsection (b) exempts from the requirements of subsection (a) attacks on "foreign groups or foreign public figures" and attacks made by candidates and their spokesmen and associates on other candidates or their spokesmen or associates. Apart from the exemptions subsection (a) of the Rule applies to any statement, comment or remark constituting a "personal attack" broadcast over a station's facilities, whatever the source. The subsection applies to statements made in the course of a news program or actual live coverage of a news event, or in a discussion program or documentary. It applies whether the statement is truthful or untruthful, whether the broadcaster acted with "malice", and whether the program presented fairly or unfairly the controversial issue and the facts on which the "attack" is based. While the Commission has conceded that "there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle" and that "the Rules are not designed to answer such questions," the Commission has invited licensees to "consult" it for "interpretation of our rules and policies" (Appendix A, page 6).

5. Subsection (c) of the Rule requires that when "a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial" a script or tape together with an offer of "a reasonable opportunity for a candidate or a spokesman of the

candidate to respond over the licensee's facilities." Where the editorial is broadcast within 72 hours prior to the day of election, moreover, "the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion."

6. In the Order under review, the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness" doctrine. This Rule may be enforced through imposition of criminal penalties or forfeitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b), as well as through license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312.

II.

Statement of Venue and Jurisdiction

7. Petitioner is incorporated in the State of New York and has its principal place of business in New York City. Venue in this Court is thus appropriate under Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343. Since the order involved is a final order of the Federal Communications Commission, this Court has jurisdiction over the subject matter of this petition under Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704.

8. As appears from paragraph 2 of the Commission's Memorandum Opinion and Order (Appendix A, page 1), Petitioner was a party to the proceedings leading to the Order under review, and filed comments in opposition to the proposed rule. Petitioner is a "party aggrieved" by

reason of the Commission's Order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person . . . adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702, as more fully set forth in paragraphs 9-11 hereof.

III.

Effects of the Rule

9. The right of reply established by the Rule would disserve rather than promote the public interest in accurate and balanced presentation of information and opinion with respect to controversial issues. For example there are situations in which the "personal attack" appears in the course of a discussion of a controversial issue of public importance, but in which the "personal attack" is merely peripheral to the public issue. Moreover, Petitioner and other licensees present many programs in which both sides of a controversial issue, including the position of persons or groups "personally attacked," are fully and fairly presented. In such cases a right of personal reply is not required to promote the public interest in an accurate report, and, if the reply is one-sided, will indeed tend to mislead the public. To attempt to correct the imbalance by a response to the reply would be likely to produce a repetition of the original "personal attack," thus creating an obligation to invite a further reply, and so on ad infinitum. A similar proliferation would occur if the reply contained a "personal attack" upon a second individual or group, since the Rule would then impose a duty to invite a rejoinder from still another quarter.

10. Subsection (a) of the Rule would inhibit free and vigorous expression and debate on controversial issues of public importance. The presentation of news, documentary

and discussion broadcasts, in which there is a vital public interest, would often be rendered impracticable if an individual or group upon whom a "personal attack" was made had to be accorded a right of reply as required by the Commission's Rule. To the extent that "personal attacks" may be claimed to be defamatory, compliance with the notification requirements of the Rule may also jeopardize defenses to a subsequent defamation suit.

11. Subsection (c) of the Rule would condition the right of broadcast licensees to present an editorial endorsement or disapproval of candidates for public office by according a right of reply to unfavored candidates. This new requirement would inhibit editorial endorsements.

IV.

Grounds on Which Relief is Sought

12. The grounds relied upon as the basis for relief are as follows:

(a) The Commission has exceeded its powers under the Communications Act in promulgating the Rule. Sections 4(i), 4(j) and 303(r) of the Act are merely authorizations to take action, by rule making and otherwise, to implement powers granted elsewhere in the statute. Section 315 is limited to a highly specific "equal opportunities" provision for candidates and a general reference to the "fairness" doctrine which does not confer any powers on the Commission. Congress has refused to provide a general federal broadcast libel remedy or even to broaden the narrowly limited statutory right of political candidates to reply to one another; Congress did not intend to empower the Commission to create a new private remedy for "personal attacks."

(b) By imposing a specific requirement that in certain circumstances a particular program (i.e. the reply of a particular individual) must be carried, the

Rule amounts to program censorship by the Commission in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. § 326, prohibiting the Commission from exercising the power of censorship.

(c) Subsection (a) of the Rule would induce licensees to delete material they desire to bradcast for the sole purpose of eliminating possible "personal attacks" and thus reduce the burdens of complying with the Rule. The Rule is therefore contrary to the principles of free debate and discussion and to the spirit of the Act. *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

(d) The Rule violates the provision of Section 326 of the Communications Act that "no regulation . . . shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . ." Moreover, it cannot be presumed that Congress in enacting the Communications Act intended to empower the Commission to issue rules raising substantial questions of interference with fundamental First Amendment rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

(e) Whatever the intent of Congress, the Rule would abridge free expression, discussion and debate in violation of the First Amendment. *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254 (1964); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Mills* v. *Alabama*, 384 U.S. 264 (1966).

(f) Even if regulation of the subject matter by rule were held to be within the Commission's power, the adoption of the Rule would be an abuse of discretion. Without achieving any public interest goal of comparable importance, it would inhibit the dissemination

of news, discussion of controversial public issues, and expression of editorial opinion, functions of communications media that are vital to the political health of a free society.

V.

Relief Prayed For

14. Wherefore, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, adopted by said Order; and

(b) Grant such other or further relief as it determines to be just and necessary.

July 27, 1967.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Supplement to Joint Petition to Review an Order of the Federal Communications Commission

Petitioners present this supplement to their joint petition for review of an order of the Federal Communications Commission, filed July 27, 1967, and state as follows:

1. On July 27, 1967, petitioners filed in this Court their joint petition to review a final order of the Federal Communications Commission, FCC 67-795, Docket No. 16574, adopted July 5, 1967, released July 10, 1967. As set forth in the joint petition, the order in question adopted a regulation (47 CFR §§ 73.123, 73.300, 73.598, 73.679) imposing certain obligations on radio and television station licensees in cases (a) where a station has broadcast an editorial

endorsing or opposing a political candidate and (b) where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue.

2. On August 2, 1967, the Federal Communications Commission adopted a further order, FCC 67-923, Docket No. 16574, released August 7, 1967, which, for purposes of clarification, amended the aforementioned regulation to state that the requirements concerning "personal attacks" are not applicable to bona fide newscasts or on the spot coverage of bona fide news events by station licensees. (A copy of this Memorandum Opinion and Order is attached as Exhibit A hereto.)

3. The Commission's action in amending its regulation by way of clarification does not affect the grounds for review stated in the pending joint petition, the standing of these petitioners, or the jurisdiction of this Court with respect to the joint petition.

Respectfully submitted,

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Supplement to Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Supplement to Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner) by its attorneys presents this supplement to its petition for judicial review of an order of the Federal Communications Commission (hereinafter the Commission), filed July 27, 1967, and avers as follows:

1. The Commission adopted on August 2, 1967, and released on August 7, 1967, a Memorandum Opinion and Order (No. FCC 67-923) amending the Rule adopted in the Order under review. A copy of the Memorandum Opinion and Order is attached hereto as Appendix A.

2. The amendment exempts from the requirements of Subsection (a) of the Rule (dealing with "personal attacks") "bona fide newscasts or on-the-spot coverage of a bona fide news event." The "personal attack" provision of Subsection (a) still applies, however, to news documentaries and news interview programs, as well as to "editorial or similar commentary" included in newscasts or on-the-spot coverage of news events. For example, statements made on a news interview program such as "Face The Nation," even though they are of sufficient news magnitude to make the first page of Monday morning newspapers throughout the country, would appear to be covered

by the Rule, although a newscast reporting that the identical statements had been made on "Face The Nation" would appear to be exempt.

3. The amended Rule fails to remedy many of the defects present in the original version. Indeed the Commission, in adopting the amendment, specifically recognized the inhibitory effect of the original Rule on news programs and for that reason exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." Nevertheless, the Commission has retained the Rule in full force and effect as to news documentaries and news interview programs. Nothing in the amendment makes the Rule any less inhibitory or objectionable with respect to such programs.

4. As amended, the Rule has become even more uncertain in its application. Not only must licensees decide whether a statement constitutes a "personal attack" or occurs "during the presentation of views on a controversial issue of public importance"; they must also make judgments as to whether, if the program involved is a "bona fide newscast or on-the-spot coverage of a bona fide news event," so as to be generally exempt from the Rule, the attack nonetheless is of such a nature (e.g., "editorial or similar commentary") so as to bring it back within the scope of the Rule. There is no indication in the Commission Memorandum Opinion and Order, moreover, whether interviews and documentary-type material broadcast in the course of newscasts and on-the-spot coverage of news events are, like editorials and commentary broadcast in such programs, still subject to the Rule. Uncertainty on these points, and the impracticability of obtaining timely advisory pre-broadcast rulings with respect to such a perishable commodity as news, will inevitably lead to licensee decisions to refrain from broadcasting news-related material and programs that are arguably subject

to the Rule. And to the extent the Commission receives and acts upon post-broadcast requests for advisory interpretations and waivers of the Rule, it will become increasingly involved in making editorial judgments heretofore the responsibility of the broadcaster.

5. While the grounds for relief stated in the Petition for Review continue to apply to the Rule as amended, the effects of the amendment require amplification of the grounds for relief as follows:

(a) The uncertainty as to what portions of generally exempted programs are still subject to the amended "personal attack" provision renders the Rule unconstitutionally vague.

(b) Continual supervision by the Commission of editorial judgments of broadcasters, through orders directing that licensees permit replies to "personal attacks," violates Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, and abridges freedom of the press in violation of the First Amendment.

(c) Because there is no rational basis, in terms of the public interest, for the Commission's distinction between program material covered and program material exempted under the amended Rule, the adoption of the Rule is arbitrary, unreasonable, and an abuse of discretion.

6. WHEREFORE, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, as amended by the Order of the Commission adopted August 2, 1967 in

said Docket, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, as amended, adopted by said Orders; and

(b) Grant such other or further relief as it determines to be just and necessary.

September 1, 1967.

WILMER, CUTLER & PICKERING
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Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Petition for Review of an Order of the Federal Communications Commission

National Broadcasting Company Inc. (hereinafter NBC), by its attorneys Cahill, Gordon, Sonnett, Reindel & Ohl, for its petition for review of a final order, as amended, of the Federal Communications Commission (hereinafter FCC), states as follows:

I

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. NBC seeks review of an order, as amended, of the FCC entered in a proceeding entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967 and released July 10, 1967, attached hereto as Appendix A, as amended by Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967 and released August 7, 1967, attached hereto as Appendix B).

2. These proceedings were initiated on April 6, 1966 by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposed rule included provisions purporting to codify two recently developed aspects of the FCC's "fairness doctrine."

3. The proposed rule set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a personal attack upon a group or individual has occurred during a broadcast relating to a controversial issue. In the case of editorial endorsement of political candidates a station would be required: (a) to give notice within 24 hours (or advance notice if the editorial is broadcasted within 72 hours of Election Day) to other candidates for the same office, (b) to provide such candidate with a script or tape of the editorial, and (c) to offer broadcast time over the station's facilities for a response by a spokesman for such candidate. In the case of a personal attack similar notice and opportunity to respond would have to be afforded the person or group under attack.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups including NBC. The grounds upon which the proposed rule was attacked included arguments that the rule is: (a) an unconstitutional restraint on freedom of speech and press, (b) beyond the FCC's statutory authority, and (c) contrary to the public interest.

5. In its Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, the FCC rejected the suggestions of NBC and others and adopted the rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Lovinger concurred in a separate opinion and Commissioner Bartley dissented; Commissioner Wadsworth was absent. As authority for the adoption of the rule the FCC invoked Sections 4(i), 4(j), 303 (r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

6. In its Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967, the FCC

amended Memorandum Opinion and Order No. FCC 67-795 by withdrawing application of the personal attack aspects of the rule to a bona fide newscast or on the spot coverage of a bona fide news event. Commissioner Cox concurred in the result and Commissioners Bartley, Lovinger and Wadsworth were absent.

7. In the Order, as amended, under review the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness doctrine" and thus has afforded NBC an opportunity to question by judicial review whether the function of the press as envisioned by the FCC and imposed on its licensees by the FCC's application of its fairness doctrine is compatible with the function of the press protected by the First Amendment of the Constitution of the United States.

II

Facts On Which Jurisdiction and Venue Are Based

8. NBC is a corporation duly organized and existing under the laws of the State of Delaware and has its principal place of business in the City of New York, State of New York. Venue in this Court is therefore conferred by Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343.

9. Jurisdiction over the subject matter of this petition is conferred upon the Court by Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704, because the order involved is a final order of the Federal Communications Commission.

10. NBC owns and operates, pursuant to license from the FCC, television broadcast station WNBC-TV, standard

broadcast station WNBC and frequency modulation broadcast station WNBC-FM in New York City as well as a number of stations in other cities. These stations carry programs involving discussions of controversial issues of public importance. NBC also owns and operates a television network and a radio network not licensed by the FCC, which furnish programs, including programs involving discussions of controversial issues of public importance, to several hundred broadcasting stations.

11. To the extent the FCC's "fairness doctrine" in general and its application of the rules adopted under FCC Order No. 67-795 in particular conflict with NBC's own high standard of professional journalism's duty of responsible expression of views, NBC is being required to give up its right to be a part of the free press and is subject to the imposition of criminal penalties or foreitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b) as well as license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312. Broadcast stations carrying the programs of the NBC Television Network and the NBC Radio Network would also have to consider the effect of the Order and Rule in determining whether or not to accept a network program since they would be subject to the same criminal penalties, forfeitures or revocation and renewal proceedings. As a result the Order and Rule would also adversely affect NBC's network programming.

12. Petitioner is therefore a "party aggrieved" by reason of the FCC's order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person * * * adversely affected or aggrieved" by reason of the FCC's order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702.

III

Grounds On Which Relief Is Sought

13. The following grounds are relied upon as the basis for relief:

(a) The Order and Regulation, as amended, are an unconstitutional abridgment of freedom of the press and speech guaranteed in the First Amendment to the United States Constitution. Freedom of the press contemplates, not that the Government shall control and regulate the press with the stated objective of compelling the press to be freely available for the communication of the opinions and views of all, but that the press shall itself be free to publish what it chooses. The rule adopted by the FCC is a serious infringement on that freedom;

(b) The Order and Regulation, as amended, violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits censorship by the FCC;

(c) The asserted statutory authorization for the FCC's Order and Regulation, as amended, does not support such regulation, particularly in an area where important Constitutional Rights are involved, and violates the equal protection requirements and due process clause of the Fifth Amendment of the Constitution of the United States; and

(d) The adoption of the rule, even if it is authorized by the applicable statutes, is contrary to the public interest and an abuse of the Commission's discretion in that it inhibits the full dissemination and communication of news and information, and ideas, without promoting any significant public interest.

IV

Relief Prayed For

14. Wherefore, petitioner respectfully prays that this Court, by appropriate order, judgment or decree:

(a) Set aside Order No. FCC 67-795 adopted by the FCC on July 5, 1967 in Docket No. 16574, as amended, and Sections 73.123, 73.300, 73.598 and 73.679 of the FCC Rules, adopted by said order, as amended; and

(b) Grand such other and further relief as is just and necessary.

Dated: New York, New York
August 31, 1967

Cahill, Gorden, Sonnett,
Reindel & Ohl

By /s/ Lawrence J. McKay
A Member of the Firm

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PROCEEDINGS IN COURT OF APPEALS

MOTION OF PETITIONER FOR LEAVE TO FILE EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its brief in the above-captioned case a separately bound Exhibit. In support of this Motion, the attorneys for Petitioner state:

One of the important issues in this case is the legality of the Federal Communications Commission's "personal attack" rules. In connection with its argument as to the effect of the rules on Petitioner's public affairs programming, Petitioner has prepared an Exhibit setting forth excerpts from transcripts of programs that contain statements arguably covered by the rules. Petitioner believes this material is relevant and will be of assistance to this Court in its consideration of the case.

All parties in this case and the companion cases (Nos. 16,369 and 16,499), pending in this Court, have consented to the granting of this Motion. Respondents United States of America and the Federal Communications Commission, however, reserve the right to argue that the material contained in the Exhibit should not be considered by this Court.

NOVEMBER 21, 1967.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Tuesday, November 21, 1967

No. 16498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of an Order from the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for petitioner,

It is ordered, That leave be granted to file a printed separately bound exhibit with its brief.

MOTION OF RESPONDENTS TO HOLD PETITIONS FOR REVIEW IN ABEYANCE

The United States of America and the Federal Communications Commission, respondents in the above-entitled consolidated cases, move that these cases be held in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, Oct. Term, 1967, certiorari granted December 4, 1967. The grounds of this motion are as follows:

1. The petitions for review herein seek review of two Memorandum Opinions and Orders of the Federal Communications Commission in which the Commission codified in rule form the procedures it had previously enunciated as a general policy directive and in *ad hoc* situations, under which a broadcast licensee is required to afford time to reply to a person or group attacked over the station, and to a candidate for public office against whom the station has carried an editorial. The Commission adopted the rules to add precision to these requirements and to provide sanctions by way of forfeiture for violation of the policies in lieu of considering violations at renewal time. It emphasized that the substance of previously enunciated doctrine was not being altered. Memorandum Opinion and Order adopted July 5, 1967, Par. 3, 4 (Exhibit A to Joint Petition for Review of Radio Television News Directors Association, *et al.*)

2. The petitions for review challenge the constitutionality of and statutory support for the "personal attack" rules. In addition, petitioners National Broadcasting Company, Inc. and Radio Television News Directors Association, *et al.*, challenge the validity of the general fairness doctrine of the Commission, which requires fair treatment of opposing viewpoints on controversial issues of public importance. The personal attack policy forms one part of this doctrine.

3. Pursuant to a stipulation approved by this Court, the petitioners filed their briefs on November 21, 1967. The respondents are presently preparing their brief which is due on December 21, 1967. A motion for an extension of time on respondents' brief to January 22, 1968 is pending.

4. On December 4, 1967 the Supreme Court granted certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 381 F. 2d 908. In that case, the District of Columbia Circuit sustained a Commission order requiring a broadcast station to provide free time to reply to a person whose character was attacked over the station. This order was issued under the personal attack policy prior to its codification in the rules here challenged. The issues presented on certiorari include the constitutionality of the personal attack policy and the general fairness doctrine, but not the requirements of the new rules on editorializing.

5. In view of the fact that the instant cases present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*, we believe that it would serve the ends of justice and avoid an unnecessary burden upon the judicial process to hold these cases in abeyance pending resolution of these basic issues by the Supreme Court. While the requirements of the rules on the right of candidates for office to reply to station editorials are not at issue before the Supreme Court, the parties will be better able to present their arguments on that question illuminated by a Supreme Court decision on the basic constitutional issues. Petitioners also, of course, may present their views on the constitutional and statutory issues to the Supreme Court as *amicus curiae*. We note in this connection that petitioners National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc. filed briefs as *amicus curiae* in response to the *Red Lion* petition for certiorari in which they unsuccessfully urged the Supreme Court to defer that case pending a decision by this Court.

It is therefore respectfully requested that this Court hold these cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, October Term, 1967.

DECEMBER 14, 1967.

ANSWER OF PETITIONERS TO MOTION TO HOLD CASES IN ABEYANCE

The petitioners in the above-entitled cases, Radio Television News Directors Association, et al., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc., hereby oppose respondents' Motion To Hold Petitions for Review in Abeyance. Petitioners suggest instead that the filing date for respondents' brief be postponed (and all other procedural dates postponed accordingly) to a date thirty (30) days after such action as the Supreme Court may take upon a petition for a writ of certiorari before judgment which petitioners intend shortly to file.[1]

In support whereof, petitioners state as follows:

I

In their motion filed on or about December 18, 1967, respondents request this Court to hold the instant cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, No. 600. The respondents say that, since these cases present "the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*," the instant cases should be held in abeyance until the Supreme Court has decided *Red Lion*.

Petitioners agree with respondents that the instant cases and *Red Lion* are closely related, although not necessarily dispositive of one another. But it does not follow that this Court should necessarily suspend all further procedural steps in these cases during what promises to be a very substantial period. There are important issues in these cases (e.g., the validity of the Commission's regulations governing political editorials) not present in *Red Lion*. Moreover, the policies and regulations at issue here are now effective and would continue in effect while the cases are held in abeyance. The Government's request for

[1] Petitioners' position herein makes it unnecessary for them to respond to respondents' Motion for Extension of Time in Which to File Respondents' Brief and Motion to Correct Motion for Extension of Time to File Briefs.

deferral until the Supreme Court finally acts in another case is unreasonable. Petitioners should not, we submit, be required to comply with burdensome requirements of questionable legality, or to risk serious penalties by noncompliance, throughout a prolonged and Government-initiated delay of proceedings for judicial review begun expeditiously by petitioners.

II

There is much to be said in favor of simultaneous consideration by the Supreme Court of the instant cases and *Red Lion*. The instant cases present the constitutional and statutory issues in the context of agency regulations of general applicability, while *Red Lion* presents only a very limited application of a doctrine which has a multiplicity of adverse effects upon public debate. In briefs *amicus curiae* filed in support of Red Lion's petition for a writ of certiorari, petitioners CBS and NBC suggested that the Supreme Court might wish to defer action on the Red Lion petition until the present cases had ripened for Supreme Court review. The Supreme Court did not defer action but granted the writ and set *Red Lion* for argument in ordinary course. Since this decision may have rested not on a rejection of the suggestion that the two cases be heard together but on the belief that review of *Red Lion* should not be delayed, petitioners have decided to seek a writ of certiorari before judgment in order to provide the Supreme Court with the opportunity, should it so desire, to review the two cases simultaneously as well as expeditiously.[2]

Accordingly, petitioners oppose respondents' motion and suggest that the date for filing respondents' brief be postponed until thirty days after the Supreme Court grants or denies the petition for a writ of certiorari before judgment to be filed by petitioners and that all other procedural steps be adjusted accordingly.

DECEMBER 29, 1967.

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[2] Since the constitutional power of the Supreme Court to grant the writ before judgment on a petition to review an agency decision is a matter of first impression, petitioners will also suggest that, if their petition be denied, the Supreme Court may wish to note that denial is without prejudice to the filing of a motion for certification of questions by the Court of Appeals under 28 U.S.C. 1254(3). See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), as to the appropriateness of a certification under these circumstances.

In the United States Court of Appeals for the Seventh Circuit

January 2, 1968

Nos. 16,369, 16,498 and 16,499, consolidated

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, BEDFORD BROADCASTING CORPORATION, CENTRAL BROADCASTING CORPORATION, THE EVENING NEWS ASSOCIATION, MARION RADIO CORPORATION, RKO GENERAL, INC., ROYAL STREET CORPORATION, ROYWOOD CORPORATION, TIME-LIFE BROADCAST, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions To Review Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Circuit Judge.*

On consideration of the motion of respondents in the above consolidated matters to correct their motion of December 14, 1967, and that the time for the filing of the petitioners' reply briefs be extended to February 13, 1968, and the time for the filing of a joint appendix be fixed as February 27, 1968; the additional motion of the respondents that these consolidated cases be held in abeyance by this Court pending a decision by the Supreme Court of the United States in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission.* No.

600, Oct. Term, 1967, certiorari granted December 4, 1967 (decision below reported at 381 F. 2d 908); and the answer of the petitioners to said motions and counter-suggestion thereto:

It is ordered that the time for the filing of respondents' brief in the above consolidated cases be and is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners, that petitioners' reply briefs be filed within 15 days after the filing of respondents' brief, and that the joint appendix be filed within 15 days after the filing of said reply briefs; provided, however, that such a petition for certiorari is filed within 30 days hereof; otherwise, the above schedule of filings shall be computed from February 2, 1968.

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONDENTS' BRIEF

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move this Court for an Order extending the time within which respondents may file their brief from February 28, 1968 to March 4, 1968. The grounds for this Motion are as follows:

1. On January 2, 1968, this Court "ordered that the time for the filing of respondents' brief * * * is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners." The Supreme Court having denied that petition on January 29, 1968, respondents are presently scheduled to file their brief by February 28, 1968. Under the terms of the Order of this Court of January 2, 1968, petitioners' reply briefs are to be filed within 15 days after the filing of respondents' brief and the joint appendix is to be filed within 15 days after the filing of the reply briefs.

2. It is now apparent that, in order to insure proper response to the issues raised by petitioners' briefs in this very important case, further consideration and consultation between counsel for the Commission and the Department of Justice will be necessary. It is for these purposes, and to allow sufficient time for printing, that this extension is requested. We understand that the time for filing reply briefs and the joint appendix remains contingent on the date respondents' brief is filed and will be extended accordingly if the Court grants this Motion.

3. Counsel for all petitioners have authorized us to advise the Court that they do not object to the granting of this Motion.

Wherefore, respondents respectfully request this Court to grant the extension of time requested.

FEBRUARY 23, 1968.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Tuesday, February 27, 1968

No. 16369–16498–9

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

Petition for Review of an Order From the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for respondents,

It is ordered, That the time for filing respondents' brief be extended to March 4, 1968.

MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move that these cases be held in abeyance and that the Federal Communications Commission be authorized to conduct further rule making proceedings. The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

It is therefore respectfully requested that the cases be held in abeyance and that the Commission be authorized to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules.

MARCH 1, 1968.

RESPONSE OF PETITIONER, COLUMBIA BROADCASTING SYSTEM, INC., TO MOTION OF RESPONDENTS TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

In a motion dated March 1, 1968, the Federal Communications Commission (the "Commission") and the United States of America, respondents herein, have moved that these cases be held in abeyance. Respondents advise that the Commission has determined to set aside subsections (a) and (b) of the rules under review, and respondents request that the Commission be authorized thereupon to conduct further rule making proceedings looking toward their revision. Petitioner Columbia Broadcasting System, Inc. ("CBS") has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

In support whereof petitioner CBS shows as follows:

1. The rules under review, which purport to "codify" and "make more precise" the Commission's earlier informal personal attack policy,[1] were initially adopted by the Commission on July 5, 1967 (and were amended on August 2, 1967). Petitions for review were filed by the Radio Television News Directors Association, *et al.* ("RTNDA"), and CBS on July 27, 1967, and by National Broadcasting Company, Inc. on August 31, 1967. (Supplemental petitions for review were filed by RTNDA and by CBS to take account of the issues raised by the Commission's August 2, 1967, amendment to the rules.) Petitioners' briefs were filed on November 21, 1967. Respondents' brief was initially due on December 21, 1967, but since that time respondents have been granted three extensions of time for filing and their brief has not yet been filed.

2. It is beyond dispute that the constitutional and statutory issues presented in these cases are substantial. The Supreme Court has recognized their substantiality both by granting certiorari in the *Red Lion* case (*Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968

[1] See July 5, 1967, Memorandum Opinion and Order ¶¶ 3, 6, R. 347, 349.

(1967) (No. 600, this Term)) and by staying further proceedings in that case pending disposition by this Court of the present cases (88 Sup. Ct. 848). The United States and the Commission appear to recognize that substantial questions have been raised concerning the validity of the rules. See the attached dissenting statement of Commissioner Loevinger (Appendix A) and the concurring statement of Commissioner Cox (Appendix B) in connection with the Commission's decision to file the present motion; see also the attached letter dated February 29, 1968, from Assistant Attorney General Donald F. Turner to the Chairman of the Commission (Appendix C).

3. The Commission, beset with doubts concerning the validity of its "personal attack" rules, is now embarking upon a process of reconsideration. Whether or not the statutory and constitutional infirmities of the rules can in fact be eliminated by the "revision" of the rules contemplated by the Commission, petitioner CBS believes that the proposed rule making proceedings will occasion a thorough reconsideration of the rules and will thus be in the public interest. However, the Commission has given no assurance that it will await a determination by this Court of the present cases before putting any new "personal attack" rules or policies into effect. In view of the pendency of the present cases and the substantial delays in their disposition, and the serious inhibitions on free speech created by "personal attack" reply requirements, any new rules or policies in this area should not be placed into effect before being subjected to judicial scrutiny pursuant to the pending petitions for review and any amendments of the petitions resulting from the contemplated "revision." The Commission has not requested a remand of these cases but merely that they be held in abeyance, and the power of the Court to impose the requirement suggested in this response cannot be doubted.[2]

[2] See Section 9 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2349; *WKAT, Inc.* v. *FCC*, 111 U.S. App. D.C. 253, 262, 296 F. 2d 375, 384, *cert. denied*, 368 U.S. 841 (1961); *United Air Lines, Inc.* v. *CAB*, 108 U.S. App. D.C. 220, 281 F. 2d 53 (1960); *WIRL Television Co.* v. *United States*, 107 U.S. App. D.C. 21, 274 F. 2d 83 (1959); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S. App. D.C. 30, 269 F. 2d 221 (1959); *WORZ, Inc.* v. *FCC*, 106 U.S. App. D.C. 14, 268 F. 2d 889 (1959); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1959), *mandate enforced*, 20 Pike & Fischer, R.R. 2095 (1960). *Cf. Tuscarora Indian Nation* v. *FPC*, 105 U.S. App. D.C. 146, 151–52, 265 F. 2d 338, 343–44 (1958), *rev'd on other grounds*, 362 U.S. 99 (1960).

Wherefore, petitioner CBS has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

MARCH 14, 1968.

APPENDIX A

DISSENTING STATEMENT OF COMMISSIONER LEE LOEVINGER

(Re motion to remand personal attack rules)

The issue of the existence and extent of Commission authority to supervise or regulate the content of broadcast programming has been disputed and debated for years, particularly with respect to the expression of opinions and the reporting of news. The issue has not been tested or decided in the courts, until current litigation, because licensees have generally deemed it more prudent not to hazard their licenses or antagonize the bureaucracy which had such great discretionary power over their business. However, the Commission and Commissioners have often stated that they invited litigation to test the legality of Commission action in this area. Ostensibly the Commission has sought and seeks the enlightenment and guidance of court decisions.

On July 5, 1967, the Commission promulgated certain rules relating to "personal attacks" and "political editorials". FCC 67–795. The stated purpose of these rules was to "clarify and make more precise the obligations of broadcast licensees" under the general "Fairness Doctrine" with respect to these matters, and to authorize the Commission to "impose appropriate forfeitures" in cases of violations of such obligations. Commissioner Bartley dissented. I concurred on the ground that "the right of reply" was a sound principle, but stated that the rules were not well drafted.

On August 2, 1967, the Commission sua sponte amended the personal attack rules, with Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. FCC 67–923. The stated ground of the amendment was the necessity of further "clarification".

In the meantime, Red Lion Broadcasting Co., appealed a ruling of the Commission under the general "Fairness Doctrine" to the Court of Appeals for the District of Columbia. The decision of that court, sustaining the constitutionality of the doctrine and the ruling of the Commission was entered June 13, 1967, *Red Lion Broadcasting Co.* v. *F.C.C.*, —— F. 2d —— (1967). Red Lion applied to the U.S. Supreme Court for certiorari and the Commission opposed. The Supreme Court granted the petition on December 4, 1967, and the case is now pending in that Court.

While the Red Lion case was on its way to the Supreme Court the Radio Television News Directors Association appealed the validity of the "personal attack" rules to the Court of Appeals for the Seventh Circuit. RTNDA petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals in order to consolidate both cases in the Supreme Court and bring several aspects of the legal issue before the Supreme Court for decision at one time. The Commission opposed this motion. On January 29, 1968, the Supreme Court denied the RTNDA petition to bring up the Seventh Circuit case immediately, but ordered the argument of the Red Lion case postponed until the RTNDA case had been decided by the Seventh Circuit and was ripe for Supreme Court review.

Now the Commission decides that it will petition the Seventh Circuit Court of Appeals to return the "personal attack" rules to the Commission for further revision and clarification. While the Commission has not decided what revision in the rules it will make, the general nature of the proposed revisions have been proposed to the Commission by its counsel. Though it is possible to express only tentative views on tentative proposals, it seems to me that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision. In any event, this endless tinkering with the language of the rules cannot affect the governing legal principles and can amount to no more than an attempt to buttress legal arguments on the Commission's behalf. The inferences which the courts, the parties and the public are entitled to draw from the Commission's wavering course are obvious and justified.

But there is a more important consideration for me. At long last the Commission is in court with competent opposing counsel testing the existence and extent of Commission authority

to supervise and regulate speech by broadcast licensees and those using broadcasting facilities. The Commission is not true to its promise to litigate or to its avowed desire to secure authoritative decision of the issues when it opposes every attempt to bring these issues before the Supreme Court and then employs such tactics as the present ones, involving inevitable and indefinite delay and confusion of the issues.

The important issues here are not the cleverness, or unskillfulness, of Commission lawyers in drafting rules. Since these rules were issued, serious doubt has been cast on their constitutional validity by authoritative publications. See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, The FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong. 2nd sess. (Feb. 1968). Regardless of any changes the Commission may now make in its rules, it will be apparent to the courts that sustaining the constitutional power of the Commission to act in this area will be to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect. The Commission may now change its rules in an effort to make a better showing in pending litigation, but it cannot expunge the record of having adopted the rules now under attack. Neither Commission counsel nor the entire Commission can give the courts any assurance that the Commission will not adopt rules just like its present rules, or more burdensome, as soon as litigation is concluded if the courts find that the Commission has the power to act at all in this area. For the Commission to rewrite its rules now is obviously merely a cosmetic effort to present a better face in court. It is not complimentary to the courts to suggest that they will be influenced by this.

Certainly the basic legal issues raised in this litigation deserve the most prompt consideration and determination that adequate judicial process will permit. The action of the Commission will simply postpone indefinitely the determination of the issues. The course now being followed by the Commission in this matter serves only its own interest as a litigant, has no public purpose, and falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees. Consequently I am forced to dissent.

APPENDIX B

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

As is often the case, I find the opinion of Commissioner Loevinger in this matter a truly remarkable document. He imputes motives to those who disagree with him which simply do not exist.

It is true that the Commission has invited litigation to test the validity of our fairness doctrine, and I have done so personally. It is not accurate to say that we have not been true to our promise to litigate the issue, that we are considering changes in our rules for mere cosmetic effect, that we are serving only our own interest as a litigant and no public purpose at all, or that our action falls short of any standards of diligence, promptness and candor which we demand of our licensees—or which would generally be regarded as reasonable in a situation such as this.

Commissioner Loevinger is perfectly entitled to believe that we should not have taken this step—indeed I was initially of that view, though for entirely different reasons that he advances, but ultimately joined the rest of my colleagues in directing our General Counsel to move the Court of Appeals for the Seventh Circuit to hold the personal attack cases in abeyance and to authorize us to take further proceedings looking toward partial revision of the rules. However, I do not think he should be allowed to distort the record without challenge—particularly since the statements he now makes are not, for the most part, the ones he advanced while we were considering the matter.

The opposition filed by the Solicitor General to the petition of Red Lion Broadcasting Company for Supreme Court review of the decision of the Court of Appeals for the District of Columbia sustaining the Fairness Doctrine and our application of it to Red Lion was not designed to delay authoritative decision of this question. The Commission and the Solicitor General believed the Court of Appeals decision was sound and urged the Supreme Court that further review was not warranted. However, the Supreme Court decided to hear the case, and we welcome its review. The Solicitor General and the Commission have opposed delay in its resolution of the matter, and are ready to proceed as soon as possible.

Similarly, the Solicitor General's opposition to the petition of the Radio-Television News Directors Association asking the Supreme Court to grant certiorari in its case prior to decision by the Court of Appeals for the Seventh Circuit was not intended to delay resolution of the fundamental issues in this area. The Red Lion case was already before the Supreme Court and constituted an appropriate vehicle for deciding many of the basic questions concerning the Fairness Doctrine. The proposal of RTNDA to by-pass the Court of Appeals was unusual in the extreme and did not seem to us at all necessary, since the collateral question of the validity of the personal attack rules we have adopted to implement this portion of the Fairness Doctrine could be decided in ordinary course, quite apart from the Red Lion case. The Supreme Court apparently concluded that it would prefer to consider both aspects of the matter at one time, but wanted lower court decisions in each case. It therefore ordered argument in the Red Lion case postponed until the RTNDA case is before it in due course. If Commissioner Loevinger must assess blame for delay in concluding the pending litigation, I would suggest that he look in this direction—though I wish to make it clear that I have no objection to the course followed by RTNDA and think the Court's disposition of the matter is entirely appropriate and may conduce, in the long run, to the earliest practicable final decision of this important litigation. But, again, we and the Solicitor General were not seeking delay. Indeed, the course we urged would have produced a Supreme Court ruling on the basic constitutional challenge to the Fairness Doctrine and the personal attack principle more quickly than any other method proposed. I think Commissioner Loevinger's charges of intentional delay cast an unwarranted aspersion not only on the Commission but also the Solicitor General of the United States, who controls our litigation in the Supreme Court and filed the pleadings in question.

It is true that the step we are not taking—if the Court concurs—will involve delay in resolving the question of our authority to adopt rules dealing with the personal attack problem, though the issue of our basic policy in this area, out of which the rules evolved, is still before the Supreme Court in the Red Lion case. The latter case can either be adjudicated in the near future, or can be deferred until we have revised the rules and they can be challenged again if their new form

is still regarded as objectionable by the parties to the present case, or anyone else.

Certainly nothing we do by way of amendment of a portion of the rules will prevent any interested party from challenging our authority to act in this area, nor will the Supreme Court be asked "to concede the power and invited the probability of adoption of rules at least as onerous as the ones now in effect." It may hold the Red Lion case until a new challenge to our revised rules is before it, in which case it will know precisely what rules we would propose to apply in this area before it makes any ruling on the basic issues of the Fairness Doctrine and the personal attack principles—as distinguished from the rules—which we have developed in a series of decided cases. But even if it decides the Red Lion case in the near future, it will be ruling, as did the Court of Appeals, on the application of our policies to a specified factual situation fully disclosed on the record in that proceeding. If it were to affirm our action in Red Lion, that would not in any way commit it to affirmance of the rules we would be in the process of revising. Those could be challenged in advance of their application to anyone, just as was done with respect to the rules we are now asking permission to reconsider in part. There is no need for us to give the Courts any "assurance" as to the revised form of the rules we may adopt because the exact form of the revised rules will be before the Courts if and when they are asked to pass on our authority to make and enforce rules in this field.

We are not proposing to change our rules "to make a better showing in pending litigation" or "to present a better face in court." We are trying to adopt a *better rule* [1] for the regulation of this important aspect of broadcasting. If we are successful in formulating a rule which will promote what we conceive to be the public interest in the presentation of both sides of controversial issues—and which at the same time will avoid results which the parties fear would result from the present

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[1] Commissioner Loevinger is quite right in saying that we have not decided what revision of the rules we will make. He suggests, based on our preliminary discussions, "that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision." Since we haven't adopted a new rule, I would simply invite him to bend his efforts toward avoiding the result he fears. He is free to make any suggestions he likes as to the language of the rule, although I don't recall any specific suggestions he made for revision of the present rule. He simply expressed the opinion that the rule "would better achieve its purpose [which he approved in principle] if it were drafted with a clearer delineation of scope and practical operation."

language of the rule and which they contend are legally or constitutionally invalid—that will certainly serve a *public* purpose, and not simply constitute a ploy in the maneuvering of counsel concerned only with victory or loss in court. If we have the authority and responsibility to act in this field, as we believe we do, then we should act as wisely and fairly as we can. If by revision of the language of the rule we can achieve what we consider to be valid goals without causing alleged impairment of the interests of the parties and the public in free broadcast journalism, then certainly we should be permitted to try to do so without being accused of lack of diligence and candor. This charge is all the more incomprehensible since we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases. (See his letter to Chairman Hyde dated February 29, 1968.)

We are not suggesting that the Courts will be "influenced" by this action. Instead, they will be asked to pass on our authority to adopt a revised rule which we have reason to believe will be more in the public interest than the one now on appeal. Certainly the Courts, the parties, and the public may scrutinize our entire course in this matter—indeed, they are asked to do so. If there are inferences to be drawn from what we have done I believe they should be far different from those Commissioner Loevinger suggests.

APPENDIX C

DEPARTMENT OF JUSTICE,
Washington, February 29, 1968.

Honorable ROSEL H. HYDE,
Chairman, Federal Communications Commission, Washington, D.C.

Re *Columbia Broadcasting System, Inc.* v. *U.S. & F.C.C.* (7th Circuit, No. 16498); *National Broadcasting Co.* v. *U.S. & F.C.C.* (7th Circuit, No. 16499); *Radio Television News Directors Assn.* v. *U.S. & F.C.C.* (7th Circuit, No. 16369).

DEAR MR. CHAIRMAN: In our consideration as a party respondent of the issues raised by petitioners in the above-entitled matters, we are fully prepared to support the Commission's position that the "fairness doctrine" is constitutional and

within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve. In discussions with members of your staff some possibilities along this line have been considered.

We therefore respectfully suggest that the Commission might wish to weigh the possibility of considering revisions of the rule before proceeding further with the cases now before the Seventh Circuit.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General,
Antitrust Division.

ANSWER OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association, *et al.*, in answer to respondents' Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, oppose said Motion unless the Commission (a) sets aside pending further order of this Court not only the personal attack regulations but also the antecedent personal attack policy which was codified in the regulations, and (b) will complete its further proceedings within 90 days.

In support whereof, petitioners state:

I

Respondents' motion to hold these cases in abeyance while authorizing further proceedings[1] does not reveal which of two widely divergent courses the Commission is proposing to follow:

(1) The Commission may mean that it will set aside not only the formal regulations issued on July 5, 1967 (as amended August 2, 1967) but also the antecedent personal attack policy which was codified in the regulations—a policy that is substantively identical and which the Commission has been enforcing for a number of years—as illustrated by *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, now pending in the Supreme Court of the United States (No. 600, this Term).

(2) Alternatively, the Commission may mean that it will set aside the formal regulations but continue to enforce the same substantive policy as part of the so-called "fairness doctrine," as it has been doing since 1962.

If respondents are proposing the first course, we would have no objection so long as the Commission's further proceedings are in fact conducted expeditiously.

If respondents are proposing the second course, we oppose the motion as another tactical step in their strategy of delaying or

[1] Respondents did not submit with their Motion either the dissenting opinion of Commissioner Loevinger or the concurring opinion of Commissioner Cox in connection with the Commission's decision to file the Motion. The two opinions are attached hereto as Appendices A and B, respectively.

avoiding an adjudication of legality of the personal attack policy in these proceedings, while at the same time continuing to enforce that policy by one means or another. (We respectfully refer the Court to Commissioner Loevinger's dissent for a description of the procedural context in which the instant motion was made.) To hold the litigation in abeyance while at the same time applying the substance of the personal attack rules in another guise would be unfair not only to petitioners but to all broadcast licensees in the industry.

For respondents to leave it uncertain whether the first or second course would result from granting its motion would be even more inequitable.

Accordingly, we urge that respondents be required to file a prompt clarification of this point before the Court acts upon the motion.

II

The significance of the foregoing distinction becomes apparent from a brief recital of the regulatory context.

The Commission's personal attack policy was first enunciated in its present form in ad hoc rulings made in 1962.[2] In a 1963 Public Notice,[3] the Commission articulated the policy, including its notice and right-of-reply requirements, in terms quite similar to those in the instant regulation. The policy was enforced principally by the threat of loss of license, which was the only formal sanction. It was not challenged in the courts until *Red Lion*, since prior to that case it was widely assumed that judicial review of the Commission's letter-rulings under the policy could be obtained only in connection with a denial of license renewal.[4]

In adopting the present regulation, the Commission emphasized that it serves "to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine." [5] Although codification has the effect of making a wider range of sanctions available to the Commission, the new regulations, in the Commission's words, "do not alter or add to the substance of the Doctrine.[6] The issuance of formal

[2] *Million Broadcasting Co.* (*Clayton W. Mapoles*). 23 R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer R.R. 951 (1962).

[3] FCC 63-734, 25 Pike & Fischer R.R. 1899.

[4] See *Red Lion*, 381 F. 2d at 910.

[5] Memorandum Opinion and Order, adopted July 5, 1967, p. 4; R. 349.

[6] *Ibid.* at 2; R. 347.

regulations, however, gave petitioners a chance to challenge the legality of the personal attack doctrine without risking loss of station licenses.

Consequently, if all the Commission proposes, while the Court holds this case in abeyance, is to turn the clock back to the day before the regulations were issued, it will have succeeded in delaying or evading a judicial test without relaxing in any degree the substantive restrictions. Conversely, although delayed in getting their day in court, petitioners and other licensees would be forced to comply with the very restraints that the Commission purports to be lifting during the interim period, through fear of the adverse effect of noncompliance in subsequent licensing proceedings.

We mean no unfairness to the Commission. Quite possibly it does intend to suspend the entire personal attack doctrine pending further rulemaking. If so, the Commission can readily clarify its position. The trenchant dissent of Commissioner Loevinger suggests, however, that we are not unduly apprehensive.

III

There is also basis for concern—in view of Commissioner Loevinger's dissent—over respondents' failure in their motion to suggest any time limit for the completion of the proposed further proceedings before the Commission. Absent such a limitation, the reopened rulemaking proceeding could be stretched over a lengthy period almost at the Commission's discretion—making it virtually certain that this case would not receive contemporaneous consideration with *Red Lion* in the Supreme Court, and thus achieving a primary tactical goal of respondents. It is noteworthy that the proceedings before the Commission which eventuated in the adoption of the present regulations consumed 15 months and that other Commission rulemaking proceedings have taken even longer.

We suggest that a 90-day period is ample for completion of the proposed further proceedings on an "expedited basis." The Commission would not, of course, be starting from scratch but instead would merely be revising a portion of a regulation concerning which it already has received voluminous comments and has already deliberated for more than a year. A 90-day limitation would be entirely feasible if the Commission genuinely intends to act expeditiously—and particularly if, as Commissioner Loevinger indicates, "the general nature of

the proposed revisions" has already been proposed to the Commission by its counsel.

Unless the Commission agrees in advance to complete its further proceedings within 90 days, we urge that the Court impose such a requirement as a condition to any grant of the motion.

CONCLUSION

Petitioners submit that, unless the Commission sets aside the entire substance of its personal attack doctrine pending further order of this Court and will complete its further rule-making proceedings within 90 days, respondents' motion should be denied.

[Appendices omitted]

RESPONSE OF PETITIONER, NATIONAL BROADCASTING COMPANY, INC., TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

This response is submitted in opposition to the motion dated March 1, 1968 by the United States of America and the Federal Communications Commission ("Commission") that these cases be held in abeyance, and that the Commission be authorized by the Court to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules here under attack. NBC opposes the motion and urges that it be denied.

NBC further urges that, even if this Court concludes in its discretion that the motion should be granted, petitioners here are entitled to certain protective conditions, *i.e.*, that the Commission be stayed pending determination of the review proceedings from enforcement of the personal attack rule and the policy embodied in it, and on the further condition that the stay of this Court's proceedings be limited to a period of ninety days.

I

Grant or Denial of This Motion Rests Wholly Within the Court's Discretion

The relief sought by the Commission's motion to hold in abeyance is not, of course, a matter of right. If this Court is authorized to grant the remand at all, such grant or denial rests wholly within the Court's discretion. Under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C.A. § 402(a), the statutory provisions which govern this petition for review are to be found in the Judicial Review Act of 1950 (formerly Chapter 19A of Title 5, 5 U.S.C. §§ 1031–1042, now codified in 28 U.S.C. §§ 2341–2351 (1967 Supp.)). By the terms of that Act, this Court's jurisdiction over the order here under review is "exclusive".

Thus, 28 U.S.C. § 2342 provides that "the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable

by section 402(a) of Title 47 * * *". This jurisdiction is invoked "by filing a petition as provided by section 2344 * * *" *id.* Section 2349(a) of the Act reiterates the "exclusive" jurisdiction conferred on the court:

> The Court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals * * * has *exclusive jurisdiction* to make and enter * * * a judgment determining the validity of, and enjoining, *setting aside,* or suspending, in whole or in part, the order of the agency. (28 U.S.C.A. § 2349(a) (1967) Supp.) (Emphasis added).

The Commission in its motion papers assume that, in the light of the Court's exclusive jurisdiction, the Commission is without authority to act at this point without the Court's consent since it asks to be "authorized" to conduct the proceedings which it contemplates.[7] This assumption is undoubtedly correct. See, *e.g., Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364 (1939); *C.A.B.* v. *Delta Airlines, Inc.*, 367 U.S. 316, 334 (1961); L. Jaffe, *Judicial Control of Administrative Action*, 709 (1965).[8]

Indeed, there may be some question whether this Court may properly grant the Commission's motion, since there is no express statutory basis for doing so. The court, in *Fleming* v. *F.C.C.*, 225 F. 2d 523, 526 (D.C. Cir. 1955), observed that the Communications Act "confers no specific authority for remand without reversal", but held that the Court had inherent power to remand to the Commission for further factual

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[7] This is consistent with the Commission's previous practice. See *Matter of Amendment of Section 3.658(d) and (e), etc.*, FCC 63-497 (Docket No. 12859), 25 Pike & Fisher R.R. 1651, 1657 n.10 (1963) where the Commission, after the filing of a petition for review had conferred exclusive jurisdiction on the court of appeals, made a similar motion requesting the court to remand and to authorize the Commission to conduct further rule-making. That motion was not opposed. See also the consistent holdings to the effect that a remand to the Commission pursuant to 28 U.S.C. § 2349(a), *supra*, cannot divest the reviewing court of its exclusive jurisdiction. *E.g., WKAT, Inc.* v. *F.C.C.*, 296 F. 2d 375, 384 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841 ("we think this statute does not contemplate that the agency can moot an appeal during a remand * * *"); *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 261 F. 2d 55, 67 (D.C. Cir. 1958).

[8] The decision in *Wrather-Alvarez Broadcasting Co.* v. *F.C.C.*, 248 F. 2d 646, 648-49 (D.C. Cir. 1957) is not to the contrary. There the Commission reconsidered its ruling after a notice of appeal had been filed but before the expiration of the time within which a petition for reconsideration had to be filed with the Commission. The Court held that during that period the Court and Commission had concurrent jurisdiction.

determinations "where the state of the record may preclude a 'just result'." (225 F. 2d at 526) There is, however, no contention made by the Commission that its desire to reconsider is based on any deficiency in the record. Neither does the Commission in its motion give any indication that it seeks the remand under 28 U.S.C. § 2349(c), which provides for remand (in certain narrowly limited circumstances) for the taking of further evidence by the agency.

Even if this Court does possess the authority to grant plaintiff's motion, it is clear that grant or denial of the motion is a matter of discretion. The Supreme Court held in *Ford Motor Co.* v. *N.L.R.B., supra:*

> * * * we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case. (305 U.S. at 370)

It is submitted that the Commission's motion does not make an adequate showing to support an exercise by this Court of its discretion to grant the requested relief, and that a consideration of all of the relevant circumstances strongly suggests that the Commission's motion should be in all respects denied.

II

The Judicial Review Now in Progress Ought Not To Be Suspended or Disrupted

The Commission's short motion, while requesting authorization "to conduct an expeditious rule-making proceeding looking toward [the] revision" of the personal attack rule gives no hint of the nature and extent of the proposed revision, nor does it provide any assurance that, after the additional rule-making proceedings are conducted, the rule will be revised at all.

Indeed, the motion indicates affirmatively that the revision contemplated is one which will not alter the significant issues in this case. The fundamental issue in these proceedings is whether the Commission may lawfully adopt *any* rule imposing on broadcasters its policy with respect to personal attacks; and any "reconsideration" which is not responsive to this basic challenge posed by petitioners can serve only to needlessly delay the final resolution of that issue.

The Commission's motion indicates that the decision to consider revision of the rule was prompted by "consideration and consultation with the Department of Justice * * *"; and Commissioner Cox in his concurring opinion states that "* * * we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases", and refers to the latter's letter to Chairman Hyde, dated February 29, 1968. (The concurring statement of Commissioner Cox and the dissenting statement of Commissioner Loevinger are annexed as Exhibit A.)

Mr. Turner's letter, a copy of which is annexed hereto as Exhibit B, makes it clear that the action which the Commission contemplates taking will in no way moot, or significantly alter, the issues raised by the review proceedings presently pending in this Court. Mr. Turner's letter states that the Department of Justice is "fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers and, that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine." Mr. Turner indicates, however, that "the rule, as drafted, raises possible problems that might be minimized by appropriate revision". Mr. Turner does not identify those problems; but whatever they are, neither the Commission nor Mr. Turner is apparently willing to concede the basic illegality of the personal attack policy and the rule, here under review, which embodies it.

The briefs which have already been filed by the petitioners in this Court raise important statutory and constitutional issues affecting, not merely the drafting details of the Commission's personal attack and editorializing rules, but its fundamental power to act in this area. The Commission's proposed additional rule-making proceedings look at most toward the revision, and probably the modest revision, of the rules now under attack, rather than to the abrogation of the rule or to the abandonment by the Commission of its policy in this area. Since that is true, allowing the Agency to begin further rule-making proceedings at this stage is unwarranted. Returning the matter to the Commission is particularly inappropriate in view of the Commission's failure to advise the Court and the parties what changes in the rule it proposes to consider. If the Court had been advised what proposed revisions the Commission had in mind, it could have itself assessed their bearing on

the issues before it. Without such advice it is compelled to evaluate the Commission's request in the dark.

Nor does the Commission's request, addressed to the discretion of this Court, moot the review proceeding. It is well-settled that voluntary discontinuance of allegedly unlawful conduct does not of itself moot an action brought to suppress such conduct, where "a dispute over the legality of the challenged practices" remains and "the defendant is free to return to his old ways", *United States* v. *W. T. Grant & Co.*, 345 U.S. 629, 632 (1953); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N.D. Calif. 1964), *aff'd sub nom, Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). *Cf. Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. 2d 111, 113 (D.C. Cir. 1929); see also *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 168 (1958). Where the dispute over the legality of the agency's acts is a "continuing" one and the public interest in seeing it resolved is urgent, mootness ought not to be allowed to prevent judicial review. *Southern Pacific Terminal Co.* v. *I.C.C.*, *supra.*[*] Obviously, this is such a case.

It is also significant that the Supreme Court of the United States has ordered that argument in a case involving closely-related issues, *Red Lion Broadcasting Co.* v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir. 1967), *cert. granted*, December 4, 1967, be postponed pending a decision in this case by this Court, and any subsequent petition for certiorari, thus evidencing its interest in the Commission's policy in this area and the desirability of having an opportunity to review and evaluate that policy in the light, not only of the facts of the *Red Lion* case, but of the considerations raised and argued in this case. To grant the Commission's motion would either frustrate the intention of the Supreme Court to consider the issues in the fashion it deems most appropriate, or alternatively, result in further delay of the resolution of the issues in the *Red Lion* case.

Moreover, the Commission's stated desire to "reconsider" its policies with respect to "personal attacks" is manifested at an exceedingly advanced stage of the proceedings. These "per-

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[*] A different case may be presented, and the case be found "moot", where the agency in question has admitted that the challenged acts were illegal, and has amended its practice accordingly, *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 330-3 (1961), but the Commission here has done no such thing.

sonal attack" policies were first formulated and applied to licensees by the Commission in 1962 (see Brief of NBC at pp. 9–10). The Notice of Proposed Rule Making was issued in April 1966, and voluminous comments from the industry were invited and received; the rule was formally adopted in July, 1967, and then amended by the Commission, *sua sponte*, in August, 1967 (Brief of NBC at pp. 2–3). Finally, the several petitioners' briefs have already been filed, and the date for filing the Commission's brief in response (a date previously extended by this Court, at the request of the Commission and without any intimation having been given that the Commission contemplated making this motion) has passed.

It has been held by the Supreme Court that the promulgation of formal rules by the Commission after rule-making proceedings of the sort conducted here is reviewable under 47 U.S.C.A. § 402(a) once "the process of rule-making was complete," *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956). See also *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418–19 (1942). It is submitted that, once the Commission has concluded a proceeding and adopted an order or rule which it regards as final, and which is subject to judicial review, it ought not to be given a free hand to interrupt judicial review of that order by recalling it for adjustment or revision during the course of the review proceeding. Once the Court's exclusive jurisdiction attaches, sound judicial administration dictates that it should be suspended for further agency action only under circumstances clearly contemplated by the statutes governing the judicial review or in circumstances where the Court has itself determined, in the exercise of its review authority, that further agency proceedings, as, for example, by way of the making of additional findings or the taking of additional evidence, are necessary (see, *e.g.*, *Fleming* v. *F.C.C.*, supra).

Even in terms of effective administration on the part of the Commission itself the proposed suspension of this Court's proceedings makes little sense. At issue in this case, and in the *Red Lion* case now pending in the Supreme Court, is the fundamental question whether the Commission has authority to act at all in the area dealt with by these rules. Mr. Turner has suggested that the Commission may make "appropriate revisions" which might "minimize" certain unidentified "possible problems". Surely, effective utilization of the time of the Commission and of the courts is not achieved by going forward with

such proposals while the Commission's power to act in this area and the scope of any such power, remain in doubt.

CONCLUSION

Under all of the circumstances, it is respectfully requested that the Court exercise its discretion to deny the Commission's motion in its entirety.

If, however, the Court concludes that the Commission should be permitted, on some terms, to conduct the rule-making proceedings for which it requests authorization, it is submitted that some protective provisions are necessary. First, in order that a resolution of the important issues presented here not be unduly delayed, the time during which this Court's proceedings are held in abeyance so that the Commission can take further action should be limited. It is submitted that ninety days should be ample time for the Commission to conduct its further rule-making proceedings on an "expedited basis".

Action is also necessary to protect the industry from enforcement of the personal attack rule and policy during the period in which judicial review is frustrated by the Commission's reconsideration of its rule. This is particularly important in view of the accelerating pace of the 1968 election campaigns and the likelihood of the multiplication of claims alleging "personal attacks" during the forthcoming months. It is therefore submitted that the Commission should be stayed from further enforcement of its personal attack rule and policy until further order of this Court.

[Exhibits omitted]

AMENDMENT TO ANSWER OF RADIO TELEVISION NEWS DIRECTORS ASSOCIATION ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association *et al.* hereby submit this amendment to their Answer to respondent's Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, and state as follows:

1. On March 14, 1968, petitioners filed their answer to respondent's motion, filed March 4, 1968, requesting this Court to hold the instant cases in abeyance and to authorize further proceedings before the Federal Communications Commission looking toward revision of its personal attack regulations.

2. Subsequently, on March 19, 1968, the Commission issued an order, to which was attached a dissenting statement by Commissioner Loevinger and a concurring statement by Commissioners Johnson and Cox, in connection with a license renewal proceeding pending before it (*Brandywine Main Line Radio, Inc.*, FCC 68–298). That order and the dissenting and concurring statements are, we believe, pertinent to this Court's determination of respondents' pending motion. In particular, we respectfully direct the Court's attention to the statement of Commissioners Johnson and Cox that "[i]n fact, no material change in the personal attack rules is contemplated by the Commission."

3. A copy of the Commission's order and the dissenting and concurring statements is attached hereto as Appendix A.

APPENDIX A

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 17141, File Nos. BR–178 and BRH–1320

In re Applications of BRANDYWINE-MAIN LINE RADIO, INC. For renewal of licenses of Stations WXUR and WXUR–FM Media, Pennsylvania

Order

Adopted March 9, 1968; Released March 19, 1968

By the Commission: Commissioner Bartley abstaining from voting; Commissioner Loevinger dissenting and issuing a statement; Commissioner Wadsworth not participating; Commissioner Johnson concurring and issuing a statement in which Commissioner Cox joins.

1. The Commission has before it for consideration a motion filed by Brandywine-Main Line Radio, Inc. (WXUR) on March 12, 1968, and a letter of March 14, 1968, requesting temporary suspension of the proceedings in the above matter pending action by the United States Court of Appeals for the Seventh Circuit on the Commission's request for authority to conduct further rule making on the personal attack rules of the fairness doctrine[1] and pending conclusion of any further rule making which may be authorized by the Court.

2. As set forth in our Memorandum Opinion and Order (FCC 67-99, released January 25, 1967), the above WXUR renewal applications were designated for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967. We are of the view that a temporary suspension of the proceedings at this juncture would serve no useful purpose and is not in the public interest.

3. *Accordingly, it is ordered,* That the above motion for temporary suspension of the proceedings filed by Brandywine-Main Line, Inc., on March 12, 1968, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,[2]

BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

(Re: Application of personal attack principle to WXUR)

This matter comes before the Commission on a motion by WXUR for temporary suspension of a hearing on its license renewal, on the grounds that the Commission is in the process of revising the substantive principles involved in that hearing.

[1] Motion to hold cases in abeyance and to authorize further proceedings filed March 1, 1968, in the cases of *Radio Television News Directors Association, et al.,* v. *U.S. and FCC* (Nos. 16,369, 16,498 and 16,499), pending in the United States Court of Appeals for the Seventh Circuit.

[2] See attached statements.

I think that fairness, rational procedures and due process of law require granting the motion. A somewhat detailed review of the facts is necessary to demonstrate this.

On April 8, 1966, the Commission issued a Notice of Proposed Rulemaking (Commissioner Loevinger absent) proposing "to codify the procedures which licensees are required to follow in personal attack situations." FCC 66-291, Docket No. 16574. The substance of the proposal was to add section 73.123 to the FCC rules stating, in language set forth in an appendix to the notice, the obligation of a broadcast licensee to advise any person or group of an attack upon his honesty, character or like personal qualities, within a specified time, and offering a reasonable opportunity to respond over licensee's facilities. Subsection (c) related to editorializing and is not relevant here.

On July 10, 1967, the Commission issued a Memorandum Opinion and Order adopting the rule relating to personal attacks as proposed in the April 1966 Notice. 8 FCC 2d 721 (1967). (Commissioner Loevinger concurred with a separate opinion, 8 FCC 2d 728.) There were slight differences in the order and numbering of the clauses, but the operative language adopted was identical with that proposed in 1966. The Commission opinion said that the purpose of adopting the rules was to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks * * *" (par. 3). The opinion explicitly stated, "These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine." A footnote said, "The only new requirement in these rules are [sic] the time limits, * * * within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks * * *" (Par. 3; fn. 3)

On January 25, 1967, the Commission ordered a hearing on the application of WXUR for renewal of its license. FCC 67-99, Docket No. 17141. The principal issue concerned the compliance by WXUR with the Fairness Doctrine. A number of groups and individuals charged WXUR with failure to comply with the Fairness Doctrine, particularly in respect to the personal attack principle, and WXUR consented to an evidentiary hearing in order to secure a determination of the controversy. The Commission specified a number of issues, including an issue as to whether WXUR "has complied with the personal attack principle of the Fairness Doctrine" by fol-

lowing the procedures that had been specified in the personal attack rule proposed in 1966 and adopted in 1967, as noted above.

Subsequent to the promulgation of the personal attack rules, the Radio Television News Directors Association and others appealed the validity of the rules to the United States Court of Appeals for the Seventh Circuit. That appeal is still pending. On March 1, 1968, the Commission moved the Court of Appeals to hold that appeal in abeyance and to authorize the Commission to conduct further rule making proceedings. The entire ground of the motion was stated as follows:

> The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

That motion was authorized and filed over my objection and dissent, for reasons which are set forth in my dissenting statement and will not be repeated here.

Following the filing of that motion, WXUR moved the Commission for a temporary suspension of the proceedings involving the renewal of the WXUR license and the charges of violation of the Fairness Doctrine, including the personal attack principle. The hearing in the WXUR matter started October 2, 1967, and has continued intermittently since then. The hearing is in recess and will resume pursuant to the Commission's summary denial of the motion for a temporary suspension.

In dissenting to the effort of the Commission to revise its rules during the course of litigation over their validity, I suggested that the course being followed by the Commission "falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees." The present action of the Commission illustrates and emphasizes that conclusion. The Commission has stated that the rules now before the Court of Appeals embody the personal attack principle of the Fairness Doctrine, adding only specific time limits for action. Certainly the Commission cannot now be asking the Court of Appeals to hold the cases in abeyance for modification

of the time limits. Such a motion would be patently frivolous and dilatory. Therefore the Commission must intend to make substantive revisions in the rules.

Assuming, as we must, that the Commission, if authorized by the Court, will make substantive revisions in the personal attack rules it will necessarily do either one of two things. Either the Commission will change the substance of the personal attack principle which is embodied in the rules, or it will change the Commission's interpretation of the personal attack principle which is embodied in the rules. No amount of logomachy or sophistry can avoid the conclusion that in reconsidering the personal attack rules the Commission either must change the substance or not change the substance.

The Commission has already declared to the Court of Appeals that it desires and intends to change the rules—which must mean to change the substance of the rules. Therefore the Commission is, in effect, committed either to abandon the prior personal attack principle as unsound, invalid, or, at least, indefensible in court, or to change its interpretation of this principle.

The hearing on the WXUR renewal involves the issue of compliance with the personal attack principle, which is stated there in almost the very words of the rule that the Commission now proposes to change. If the Commission is about to admit that the principle is unsound or to change the principle by changing its statement and interpretation, then it certainly makes no sense at all to continue a hearing based upon the about-to-be-abandoned-or-modified principle. But the problem is even simpler than this. WXUR says that it must know what interpretation or view of the personal attack principle the Commission takes in order to know what evidence is relevant to the issue of compliance. The same problem confronts the other parties to the proceeding. By insisting that the Hearing Examiner proceed with the WXUR hearing before determination of the uncertainty created by the Commission concerning the underlying principles involved, the Commission is stultifying that proceeding and frustrating the possibility of rational presentation or consideration of evidence on this issue.

If the Commission was correct in stating that the personal attack rules merely codified prior precedent and added only specific time limits for action, then the court test of the present rules is a fair examination of the basic principles which the Commission has developed in this field and which the Com-

mission seeks to apply in the WXUR case. If these principles are to be changed or abandoned, then the Commission should not only seek advantage to itself in its litigation but should give other parties whatever advantage there may be in the changes or abandonment of these principles. The Commission cannot fairly, properly and honestly demand that the validity of its principles be judged on the basis of some statement drafted specifically for the purpose of passing scrutiny before a court while it is simultaneously refusing to allow parties before it to be judged under the same statement of principles. The present position of the Commission seems to be that the personal attack principle means one thing when it is applied by the Commission to a party being judged before it, but that it means something else when the Commission is being judged before a court on the validity of that principle.

The Commission ruling on the WXUR motion not only casts further doubt on the propriety of the Commission motion in the Court of Appeals but forebodes increasing confusion and difficulty in this important and uncertain area during the coming months. At a time when the Commission and the country may confidently anticipate that there will be a substantial number of complaints and charges relating to fairness and personal attacks growing out of the coming elections, the Commission has made it impossible for anyone to know what the applicable principles or rules are or what course the Commission will follow, if the Court of Appeals permits it to follow its own course. The Commission now is needlessly and without purpose compounding confusion in a most delicate and dangerous area.

CONCURRING OPINION OF COMMISSIONER NICHOLAS JOHNSON IN WHICH COMMISSIONER KENNETH COX JOINS

I concur in the Commission's disposition of the motion before us and append these brief comments only in order not to leave unanswered the dissenting statement filed by Commissioner Loevinger.

Over one year ago Brandywine-Main Line Radio, Inc., licensee of WXUR-AM and WXUR-FM of Media, Pennsylvania, applied for renewal of these broadcast licenses. On January 25, 1967, the Commission designated the applications for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967.

In today's action, we have denied Brandywine's request that we suspend the renewal hearing, pending action by the Court of Appeals for the Seventh Circuit in a separate case wherein the legality of the personal attack rules promulgated by the Commission in July 1967 are at issue. *R.T.N.D.A., et al* v. *U.S. and F.C.C.* (case numbers 16369, 16498, 16499). In that case, the FCC has requested authority to revise further the personal attack rules. Brandywine notes that the product of the pending revision will probably be a "less restrictive" set of regulations than those presently on our books. Therefore, it contends, it is entitled to take advantage of any modifications which might be favorable to its renewal case, and that a suspension of the proceedings is necessary to grant this deserved opportunity.

But fairness to WXUR does not require such a suspension. It is extremely unlikely that any changes in the rules will affect the situation under review in Brandywine's renewal hearing. If by chance the new standards turn out to affect materially Brandywine's case, the Commission will be more than willing to grant counsel the opportunity to introduce into the record whatever new evidence or contentions they consider appropriate. Suspension of the hearing presently in progress will do Brandywine no good—except insofar as it causes delay and thereby puts off the day when the Commission eventually renders judgment on the ultimate question of its qualifications as a licensee.

In view of the simple and inconsequential procedural question at stake herein, Commissioner Loevinger is to be congratulated on both the length of his dissenting opinion and on the remarkable show of indignation he has mustered. As in his similar condemnation of the Commission's recent decision to ask the Seventh Circuit Court of Appeals for leave to revise the personal attack rules, Commissioner Loevinger's remarks distort the purpose and effect of our action. FCC Public Notice No. 13493, March 1, 1968 (concurring opinion of Commissioner Cox). They deserve, therefore, a brief response.

First, it should be pointed out that, contrary to the impression created by Commissioner Loevinger's opinion, WXUR's performance is being judged on five separate issues—not just the question of its compliance with the Commission's personal attack requirements. In the Memorandum and Order originally designating the application for hearing, we defined those issues as: (1) whether the applicant has met the conditions set forth

in the Commission's Memorandum Opinion and Order of March 17, 1965 (FCC 65-207) during its license period from April 29, 1965 to August 1, 1966; (2) the efforts, if any, which the applicant has made to ascertain and serve the needs and interests of the public served by its stations; (3) whether the applicant fully and candidly advised the Commission of its program plans in connection with its application for acquisition of control of the stations involved; (4) the applicant's efforts to comply with the Commission's Fairness Doctrine, including the personal attack principle; and (5) whether the applicant has used the facilities of its stations to serve the sectarian and political views of its principals and to raise funds for their support rather than to serve the community generally, and whether this was misrepresented to the Commission in its application for acquisition of control of these stations.

There would be no point to suspending a hearing, which has now been in progress since October 2, 1967, on the ground that the standards governing one of the five points at issue might soon undergo material modification—even if such a material change were in the offing.

In fact, no material change in the personal attack rules is contemplated by the Commission. Commissioner Loevinger is well aware of this fact, since he participated in the meeting at which the matter of seeking authority from the Court of Appeals was discussed. Nevertheless, he speculates that we may "abandon the prior personal attack principle as unsound, invalid, or at least, indefensible in court. * * *" I believe it important to record that Commissioner Loevinger speaks only for himself in this regard, and does not reflect the understanding or belief of the majority of the Commission. It would be unfortunate if his characterization of the majority's intentions were to be used in support of a campaign to discredit the basic principle which Commissioner Loevinger originally endorsed but has now decided to regard with distaste.

Since none of the five Commissioners who voted to seek authority to revise the rules share Commissioner Loevinger's new doubts about either the wisdom or the legality of the basic personal attack principle, the possibility is especially slim that the forthcoming revisions will bear on WXUR's case. The WXUR licenses were designated for hearing *before* the present rules were promulgated. To the extent that personal attack questions are involved in the hearing, they will relate to the

principle as enunciated in individual cases decided before it was codified in the rules. Therefore, any revision of the new rules will not affect Brandywine's case in any event. Practically speaking, there is little chance that a radical change will occur.

In sum, I believe the Commission's ruling in this case to be commendably expeditious and equitable as well as legal, and hope these few words of explanation will help to quell whatever specters have been raised by Commissioner Loevinger.

REPLY OF RESPONDENTS TO PETITIONERS' RESPONSES TO RESPONDENTS' MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The respondents have moved this Court to hold these cases in abeyance in order to permit the Federal Communications Commission to revise the personal attack rules under review. In response to this motion, petitioner CBS has stated that it has no objection so long as the Commission is prohibited from putting any personal attack reply requirements into effect pending disposition of the present cases. Petitioner RTNDA, raising the question of the difficulties presented by a hiatus during the course of further rule making, urges that a 90 day limit be placed upon further proceedings and states that it does not object to grant of the motion if the Commission's rules and its past policy are set aside while the rules are being revised. Petitioner NBC opposes the motion, essentially on the ground that voluminous comments have already been submitted to the Commission, that there is no warrant for permitting further revision, and that the basic constitutional and statutory problems would not be affected by revision of the rule.

Respondents agree that any extended further proceedings before the Commission would be undesirable, particularly from the public interest viewpoint of the importance of having settled policy in this area. As both NBC and RTNDA have pointed out, a full rule making proceeding with voluminous comments has already been held. In light of this fact, the Commission proposes immediately to revise its rules in the event this Court grants the pending motion, without seeking further comment. Attached hereto is a Proposed Memorandum Opinion and Order revising subsection (b) of the rules which the Commission proposes to adopt. It would further exempt from the requirements of the rules commentary in newscasts and in on-the-spot coverage of news events, and news interviews, including commentary. This procedure of immediate revision, although necessarily subject to consideration of any petitions for reconsideration which might be filed, should avoid any extended hiatus, and any need to consider a stay pending further proceedings. We believe that it will also permit an

early hearing of these cases. The Government is prepared to meet any expedited schedule set by the Court for such revised or supplemental briefs of petitioners as may be appropriate and the filing of the Government's brief.

However, we do not agree with NBC that it is appropriate to require the Commission to maintain rules it wishes to change. Petitioners have no vested right to the present form of the rules. *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364 (1939). Nor do we believe it desirable to proceed with argument while the rules are being changed, since the large constitutional questions presented should clearly be decided upon the basis of the precise rules finally adopted by the Commission.

Finally, we strongly oppose the request of CBS that this Court stay in advance any revised rules which the Commission may adopt. No request for a stay *pendente lite* has been made by any of the petitioners in these cases, and the present CBS request not only applies to rules whose nature and effect are as yet unknown, but is unaccompanied by any attempt to make the showing of irreparable injury which is a requisite for the injunction requested.

MARCH 22, 1968.

Before the Federal Communications Commission

Docket No. 16574

In the Matter of Amendment of Part 73 of the Rules relating to procedures in the event of a personal attack.

PROPOSED MEMORANDUM OPINION AND ORDER

Adopted: Released:

By the Commission:

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (*Radio Television News Directors Assn., et al.* v. *United States*, Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. This opinion and order deals with that revision. Since the revision is of a

relatively narrow nature[2] and directed only to subsection (b) of Sections 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[3] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and wish to revise only one portion of it. See *Red Lion Broadcasting Co.* v. *United States*, 381 F. 2d 908 (C.A.D.C.), *certiorari granted*, —— U.S.

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

3. We have consistently sought to promote the fullest possible robust debate on public issues. See *Letter to Storer Broadcasting Co.*, January 31, 1968, FCC 68–120. We have also stated our belief that the fairness doctrine promotes that goal. *Ibid.* CBS does not dispute the latter, but does claim, *inter alia*, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to Section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see Memorandum Opinion and Order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to Section 315 stressed the im-

[2] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance * * *", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

[3] See Memorandum Opinion and Orders; 8 F.C.C. 2d 721 (July 5, 1967; 32 Fed. Reg. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 Fed. Reg. 11531).

portance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, news interviews, and news documentaries, and on-the-spot coverage of bona fide news events—from the "equal opportunities" requirement of Section 315, stating that the fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programming where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254–55. See Sen. Rept. No. 560, 86th Cong., 1st Sess., where it is stated (p. 11):

> It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program.

In light of the above two considerations, we have decided to strike the balance in favor of exempting these news categories, other than the news documentary. It avoids *any* possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities." The fairness doctrine remains specifically applicable to these programs. See Section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st Sess., p. 5; see par. 5, below.

4. We shall expand the exemptions in (iii) of subsection (b)

to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category, "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[4] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., pp. 83–94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See par. 3, 9 F.C.C. 2d 539.[5] We note that in this area we have found instances of failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The Section 315 exemption is limited to bona fide documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even *possible* inhibition in the case of a documentary, which is as-

[4] We stress that the categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these exempt categories, to the extent pertinent, will be followed in this field also. (See, e.g., H. Rept. No. 1069, 86th Cong., 1st Sess., p. 4, as to the legislative history of the term "bona fide news interview."

[5] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266–267.)

sembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect this to be the usual practice. See note 4, *supra*.

5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc. (WRAL)*, July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have re-examined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendment to Section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the

method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects.[6]

7. We have acted here to expand the exempt categories further along the lines of the exemption made on August 2, 1967 (FCC 67–923),[7] on the basis of the notice and the comments received in this docket (No. 16,574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14):

> * * * the public interest should benefit from it. If not, adequate opportunity to remedy it is available.

That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in Sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

Accordingly, *It is ordered*, That the rule revisions contained in the attached Appendix ARE ADOPTED, effective. See Sec-

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[6] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

[7] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, *supra*), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

tion 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment

APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, on-on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

* * * * *

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

I dissent from the Commission motion to amend the rules now pending before the Court of Appeals because I believe that the course the Commission has followed with respect to these

rules has been hasty, ill-considered and inadequate, and the revision now proposed is substantively defective. However, the present motion effectively supersedes the motion made March 1, 1968, in these cases, is more specific and limited and less dilatory than the March 1st motion, and in these respects partially meets some of the objections to the Commission course noted in my dissent to the March 1st motion and to the Commission ruling on a related matter in the WXUR case. If the Court grants the present Commission motion, the Commission must thereafter act formally to adopt the proposed revisions to the rules; and it will then be appropriate to state my objections to them in detail. If the Court does not grant the present motion neither the proposed revisions to the rules nor the objections to them will be significant. Thus it is sufficient at this point to note my dissent and reserve detailed and substantive comment until the substantive issue is before the Commission.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissented to the Commission's action of July 5, 1967, adopting these personal attack rules and stated:

> "The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature." (Docket No. 16547)

I hold to that view.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

March 22, 1968

No. 16369

Before Hon. LATHAM CASTLE, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*, Hon. WALTER J. CUMMINGS, *Circuit Judge*.

RADIO TELEVISION NEWS DIRECTORS ASS'N, ET AL.

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

CBS *v.* U.S.A. AND F.C.C., No. 16498

NBC *v.* U.S.A. AND F.C.C., No. 16499

Order

Upon consideration of the motion to hold these cases in abeyance, the responses thereto, the Government's reply, and the amended answer of Radio Television News Directors Association, et al., it is ordered that the motion be denied, but leave is granted to the Federal Communications Commission to revise forthwith subsection (b) of the rules involved in these petitions for review.

The Government's brief shall be filed on or before April 1, 1968, and the petitioners' reply briefs within 15 days thereafter. Since petitioners may need to discuss the new rules in their reply briefs, the usual 20-page length will not apply.

MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its reply brief in the above-captioned case a separately bound Supplemental Exhibit. In support of this Motion, the attorneys for Petitioner state:

One of the important issues in this case is the legality of the Federal Communications Commission's "personal attack" rules. In connection with its opening brief as to the effect of the rules on Petitioner's public affairs programming, Petitioner prepared an Exhibit setting forth excerpts from transcripts of programs that contained statements arguably covered by the rules. On November 21, 1967, this Court granted Petitioner leave to file this Exhibit together with its brief. Petitioner's Supplemental Exhibit, discussed in its reply brief, sets forth excerpts from transcripts of programs and other material pertinent to the Commission's revised rules. Petitioner believes this material is relevant and will be of assistance to this Court in its consideration of the case.

All parties in this case, and the companion cases (Nos. 16,369 and 16,499) pending in this Court, have consented to the granting of this Motion. Respondents, United States of America and the Federal Communications Commission, however, consent subject to the argument contained in footnote 40, p. 54 of their brief.

APRIL 16, 1968.

United States Court of Appeals for the Seventh Circuit

CHICAGO, ILLINOIS 60604

Wednesday, April 17, 1968

No. 16498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of an Order From the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for petitioner,

It is hereby ordered, That leave be granted to file instanter with petitioners reply brief a separately bound Supplemental Exhibit.

In the United States Court of Appeals for the Seventh Circuit

September Term, 1967—April Session, 1968

Nos. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

September 10, 1968

Petitions for Review of Orders of the Federal Communications Commission

Before CASTLE, *Chief Judge*, KILEY and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. This review raises the question of the constitutionality of the Federal Communications Commission's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for

radio and television stations[1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967 (adopted on July 5, 1967); which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc., (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror* [5] ruling as to station editorials endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on

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[1] These petitioners are Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

[2] Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

[3] The rules as set forth in the July 10 order appear in the appendix to this opinion.

[4] Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations favored the Commission's rules.

[5] *Times-Mirror Broadcasting Co.* (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the "'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

"Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast." *Id.*

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." *Id.* at 406.

the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules, however, only if made "during the presentation of views on a controversial issue of public importance."

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the *Report of the Commission in the Matter of Editorialization by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Commission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

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[6] The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

"It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.*" (Emphasis added.)

[7] That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

Because "the procedures specified [in prior Commission rulings] [8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second, to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said that the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to

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obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[8] In particular, The Commission referred to the Public Notice of July 26, 1963; *Controversial Issue Programming*, F.C.C. 63-734 and Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

the alleged discouragement of controversial issue programming, the Commission responded:

> Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> As to these particular rules; we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, *i.e.*, the personal attack or the licensee's editorial.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the *Report on Editorialization*," 13 F.C.C. 1246 (1949) and the decision in *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir.), *certiorari granted*, 389 U.S. 968 (1967).[9]

Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter

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[9] On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922 (1968).

[10] This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

exemption was thought to be appropriate in view of the "equal opportunities" provision of 47 U.S.C. §§ 315 [11] with respect to broadcasts by political candidates.

The Commission's purposes in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond." [12] The response can be made through a spokesman of the candidate's choice.[13] A twenty-four-hour notification requirement was imposed because "time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial." In those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-

[11] In pertinent part, section 315 reads:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast.

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection."

[12] The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

"The phrase: 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an oportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

[13] The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunity' cycle" which might be initiated if the candidate himself responded.

minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

On August 7, 1967 the Commission [15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commission exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number, * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not

[14] The rules issued on July 10, 1967 were to become effective on August 14, 1967.

[15] Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

[16] The respective petitions for review were supplemented to take account of the August 7 order.

[17] The amendment as set forth in the August 7 order appears in the appendix to this opinion.

thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee, having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request, and on March 29, 1968, the Commission[19] issued a Memorandum Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision[20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either

[18] The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

"[W]e are fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve."

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stated pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commisison's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

[19] Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commissioner's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

[20] The amendment as set forth in the March 29 order appears in the appendix to this opinion.

bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature," [21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that

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[21] The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

"Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, 'when, during the presentation of views on a controversial issue of public importance * * *,' the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack, which makes the honesty, integrity, or character of an identified person or group an issue in that discussion."

[22] See note 11, *supra*.

fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to section 315]," [23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In adition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his faciliites to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that

[23] Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

"We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also."

[24] RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

the necessity of airing replies will have in displaced previously schedule programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually responsible for all the material which he broadcasts.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commissions offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative

would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This nonexisting constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fashion that under the rules as amended, there is no "possibility of inhibition" of licensees.

We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to access claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, least, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, Government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 432, 433 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), delineated the

Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the *New York Times* case, a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less stringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278.

The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public

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[25] Other decisions in which the Supreme Court explored the implications of *New York Times* are: *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (public official's defamation action after televised speech critical of him); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (public figures' libel action after printed articles critical of them); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); *Mills* v. *Alabama*, 384 U.S. 214 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each

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[26] The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

[27] The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

[28] See note 6, *supra*.

broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers [29] could be determined on the basis of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new

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[29] The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

"(b) Violation of rules, regulations, etc.; * * *.

"(1) Any licensee or permittee of a broadcast station who—

* * * * * *

"(B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States,

* * * * * *

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter."

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

"(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

* * * * * *

for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

* * * * * *

"(b) Cease and desist orders.

"Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[30]

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[31]

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But

[30] In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

[31] In *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966), the Supreme Court discussed the vanguard role of the press in the following language:

"Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act. [32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree.[34]

We agree with the petitioners that such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court)[35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Com-

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[32] 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[33] See text *supra* at 7.

[34] "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in the other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

[35] The latest revision was prompted, according to an assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

munist." [36] In its memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "The rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity or character of an identified person or group an issue in that discussion." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quote language is that there is little, if anything, distinguishing "editorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labelled station or network editorial" still subject to the rules.[37]

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[36] On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the *Fairness Primer*, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 20 Fed. Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

[37] A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even *possible* inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-

[38] There is some question whether the Commission's action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

[39] For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. Wood, ELECTRONIC JOURNALISM, 46–49 (1967).

spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, * * * Such issues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In *Smith* v. *California*, 361 U.S. 147, 154 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in *Red Lion Broadcasting Co., Inc.* v.

[40] The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commisison's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

FCC, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967). *Red Lion* concerned the challenge by a radio station licensee of a Commission order requiring the licensee to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack "* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *" in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under

> the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F. 2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion*, sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on *Na-*

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[41] See page 82, *supra*.

[42] In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 *Report on Editorializing*. Those two general paragraphs written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of *New York Times* and its progeny.

tional Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest." [43] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers.[45] In most major

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[43] *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 479 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

[44] Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

[45] In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, nos. 737, 746 (88th ed.).

metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second, the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can

[46] RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967*; Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue*.)

be owned by anyone is simply to indulge in fantasy." [47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).[48] Accordingly, the Commission cannot impose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in

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[47] Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 1952 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion*.

[48] The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle." [49] (Emphasis added.) When this disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees who engage in

[49] The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the rules, thereby chilling the exercise of his first amendment rights.

"willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is assumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U.S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful constitutionality," *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959), is lacking. And even if it could not be determined that rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in *Greene* v. *McElroy*.

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from

[50] The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(f) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing *National Broadcasting Co. Inc.* v. *United States*, 319 U.S. 190 (1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidate in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C.

315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however*, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 29 Fed. Reg. 10415.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

Tuesday, September 10, 1968

No. 16369, 16498, 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions for Review of Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This cause came on to be heard on the petitions for review of orders of the Federal Communications Commission, and the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Federal Communications Commission's order adopting the personal attack and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day.

MOTION OF RESPONDENTS FOR STAY OF MANDATE

The United States of America and the Federal Communications Commission, respondents herein, respectfully move, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, that the Court stay its mandate for a period of thirty days upon the conditions set forth below. The ground of this motion is that the respondents intend to file a petition for a writ of certiorari, and that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein.

In its decision of September 10, 1968, this Court set aside the Commission's rules governing the responsibilities of broadcast licensees where they have carried personal attacks against persons or groups or have broadcast political editorials. The Court recognized that the District of Columbia Circuit had sustained an order requiring a station to furnish free reply time in a personal attack situation prior to adoption of the rules, *Red Lion Broadcasting Company* v. *F.C.C.*, 381 F. 2d 908, *cert. granted* 389 U.S. 968, and that the two circuits were therefore in disagreement as to the constitutionality of the Commission's requirements in the personal attack situation.

If the mandate issues in these cases, there will be great uncertainty on the part of both the Commission and all broadcast licensees as to the applicable requirements to be followed until such time as certiorari is denied or the Supreme Court renders its decision in these cases and in *Red Lion*.[1] The method by which the Commission might apply the general Fairness Doctrine, whose validity was not adjudicated in this Court's decision, would also remain in doubt during this interim period in view of the fact that the Court has rejected the Commission's position that fairness would require the station itself to present the opposing view in a personal attack situation or give time to the person attacked. (Slip Opinion, p. 15, note 27). The significance of these problems, and similar problems with political

[1] Oral argument in Red Lion was postponed to await the outcome of these cases and the disposition of any petition for certiorari to review this Court's decision.

editorials, is of course heightened by the fact that this is an election year and a time, accordingly, when both the Commission and licensees must reach decisions which are not subsequently remediable. We believe all parties would agree that certainty in the governing standards is imperative at this time.

We believe it is also significantly relevant to note that the petitioners permitted the rules to go into effect without seeking an interlocutory stay at the time the rules were adopted in July, 1967, although suspension of the rules pending disposition of the cases or further order of the Court was requested in March, 1968 when respondents petitioned to hold the cases in abeyance pending further rule making proceedings to amend the rules. (See Response of Petitioner CBS, Inc. to Motion of Respondents to Hold Cases in Abeyance and to Authorize Further Proceedings, dated March 14, 1968.) The Court, by order of March 22, 1968, while denying the motion to hold the cases in abeyance, granted leave to revise the rules forthwith in the form then proposed by the Commission, and did not issue a stay order.

In light of these considerations, we request that this Court's mandate be stayed so that the rules may serve as a guide to licensees during this crucial period. The Commission would enforce the regulations only through rulings (which are subject to review in Court), and would undertake, and so advise all licensees, not to impose any fine or forfeiture, institute any renewal or revocation proceedings, or seek criminal penalties, based on conduct occurring during the period of further review. In addition, no pending renewal or revocation proceeding involving the rules would be concluded until the Supreme Court's review is completed. We believe that this course would serve to provide the needed certainty and, at the same time, remove any threat of a severe penalty for licensee error or violation.

For the foregoing reasons, it is requested that the Court stay issuance of its mandate for thirty days, until October 31, 1968, upon the conditions set forth above.

SEPTEMBER 27, 1968.

OPPOSITION OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION FOR STAY OF MANDATE

We agree with the respondents "that this is an election year" when journalistic decisions will be made "which are not subsequently remediable." But the question here is whether enforcement or non-enforcement of the challenged rules pending Supreme Court review will result in irremediable damage to the public interest. We believe that the enforcement of the rules will irreparably damage the public interest in wide-open, uninhibited and robust public debate at a time in our history when the importance of such debate has never been more crucial and its absence, therefore, more injurious.

The Court found that the Commission's rules discourage and inhibit public debate, tend to induce licensee "self-censorship" (pp. 21–22),[1] might result in "blandness and neutrality" (pp. 15, 17), and that their vagueness and lack of specificity give rise to the threat of Commission censorship (p. 18). It is these rules that the Commission proposes to "enforce," pending further litigation, through orders to licensees which are to be judicially enforced. See Section 401(b) of the Communications Act, 47 U.S.C. § 401(b).

The Commission's willingness to forego certain sanctions is illusory if by this it intended to show that the unconstitutional effects of the rules would be negatived thereby. Licensees are accustomed to obey Commission orders. Further, licensees will be just as much inhibited by the threat of a contempt of court citation in the event of a violation as by the sanctions the Commission is willing to forego.

Moreover, nothing that the Commission has been willing to forego lifts the "substantial economic and financial burdens" upon licensees that the rules impose (p. 15). The Commission still casts itself in "the role of a censor" (p. 18). The requirements of the rule are still "mandatory" (p. 16) and threaten the licensee with "severe and immediate penalties" for their violation. "Blandness and neutrality" (p. 17) and "self-censorship" (pp. 21–22) would be every bit as likely under the conditions of the stay proposed by the respondents as they were previously.

[1] Page citations are to the Court's slip opinion of September 10, 1968.

Thus, the respondents have proposed nothing that would negative the extremely adverse effects upon constitutionally protected speech as found by this Court. They plead only that it "is necessary [for the Commission] to furnish licensees with guidelines" and that "certainty in governing standards is imperative at this time." The term "guidelines" is merely a euphemism for the censorship that this Court condemned. And the question as to how they achieve "certainty" by enforcing rules that the Court found to be vague and uncertain (pp. 19–21) is completely begged by the respondents.

Every Presidential election to date has been held without Commission censorship in the form of the rule it wishes now to enforce. Yet it makes no attempt, in the light of this history, to show that without its "guidelines" a serious danger to the electoral process would be so imminently threatened that the Court should permit enforcement, pending further litigation, of rules found by it to violate the Constitution. This was the respondents' burden, which they have utterly failed to sustain.[3]

For the foregoing reasons, the instant Motion should be denied.

OCTOBER 1, 1968.

[3] That petitioners did not seek an interlocutory stay of the rules at the time of their issuance is not in any sense inconsistent with their present position, as the Government appears to suggest (p. 3). When the rules were issued, a critical Presidential election was not imminent; nor had there been a clear judicial determination of the rules' adverse impact upon broadcast speech.

OPPOSITION OF PETITIONER NATIONAL BROADCASTING COMPANY TO RESPONDENT'S MOTION FOR STAY OF MANDATE

In their motion for a stay of mandate dated September 27, 1968, respondents request that, even though this Court has held the Commission's "personal attack" and "editorializing" rules to be unconstitutional and invalid, the Commission should nevertheless be permitted to continue to enforce these rules against broadcasters, pending application for certiorari to the Supreme Court and a final decision by the Supreme Court. NBC believes that such a stay is neither necessary nor justified; and opposes the respondents' motion.

Under rule 41(b) of the Federal Rules of Appellate Procedure, if the Court grants the requested stay of mandate, and the respondents subsequently file a petition for certiorari, this Court's mandate will be automatically stayed "until final disposition by the Supreme Court." The respondents have made no showing which would justify continued enforcement of the Commission's unconstitutional "personal attack" and "editorializing" rules pending final review by the Supreme Court.

In its decision dated September 10, 1968, this Court held that:

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee selfcensorship, we conclude that the personal attack and political editorial rules would contravene the First Amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means * * *. We do not believe the Commission has made such a demonstration.

The Commission's rules were declared invalid because they constitute an illegal encroachment upon a free press, fundamentally at odds with the Constitution. It is clear, as this Court has found, that the rules inhibit and burden broadcasters in their presentation of news and comment on controversial public issues, and confer upon the Commission an unwarranted power of censorship over such broadcasts. Perpetuating these

oppressive rules during the next several months could be justified only by a very strong showing that an illegal rule is superior to no rule. No such showing has been made by the Commission.

Respondents assert "that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein." However, respondents fail to explain the basis for their assumption that broadcast licensees will be unable to conduct their business without benefit of the "guidelines" which have been declared by this Court to be an illegal encroachment upon the First Amendment rights of these licensees. The respondents' position is particularly anomalous in the light of this Court's conclusion that, far from being a precise and useful guideline, the rules are unconstitutionally vague.

Nor is the stay warranted by respondents' assertion that their enforcement will be moderated in some fashion during the period of Supreme Court review. To the extent that there is continued enforcement or threat of enforcement the rules will continue to have the oppressive effect which, in the view of this Court, marked them as unconstitutional. If the Commission intends to deprive them of any significant impact during this interim period, there is no compelling reason for the requested stay.

CONCLUSION

For the reasons stated, we submit that this Court's mandate should issue without further delay.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Friday, October 11, 1968

No. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

Vs.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petitions for Review From an Order From the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This matter comes before the Court on the motion of respondents to stay the mandate of this Court for a period of thirty (30) days, opposition of petitioner, Radio Television News Directors Association, et al to said motion and opposition of petitioner National Broadcasting Company to said motion.

On consideration whereof, *It is ordered* by the Court that the mandate of this Court in the above entitled cause be stayed for a period of thirty (30) days from this date subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 16,498

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

Petition for review of an order of the Federal Communications Commission

EXHIBIT TO BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

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INDEX

PAGE

I. ERIC SEVAREID COMMENTARIES (CBS EVENING NEWS WITH WALTER CRONKITE): NOVEMBER 22, 1966-OCTOBER 12, 1967

November 22, 1966 2
December 5, 1966 3
December 13, 1966 4
January 3, 1967 6
January 5, 1967 7
January 20, 1967 9
January 24, 1967 10
January 30, 1967 11
February 14, 1967 12
February 17, 1967 14
February 28, 1967 15
March 2, 1967 17
March 3, 1967 18
March 7, 1967 19
March 14, 1967 20
March 17, 1967 22
April 18, 1967 23
April 27, 1967 25
April 28, 1967 26
May 2, 1967 27
May 4, 1967 28
June 15, 1967 30
June 21, 1967 31
June 27, 1967 33
August 31, 1967 34

PAGE

September 5, 1967 35
September 7, 1967 37
September 12, 1967 38
September 13, 1967 40
September 14, 1967 41
October 12, 1967 42

II. FACE THE NATION: MARCH 13, 1966-OCTOBER 15, 1967

March 13, 1966: Representative Melvin Laird .. 44
March 27, 1966: Representative Gerald R. Ford 46
April 17, 1966: Senator Vance Hartke 47
May 1, 1966: Senator Eugene J. McCarthy 48
May 8, 1966: Arthur M. Schlesinger, Jr. 50
May 15, 1966: Barry Goldwater 51
June 12, 1966: Governor George W. Romney .. 51
June 19, 1966: Stokely Carmichael 54
July 10, 1966: Senator Jacob K. Javits 57
August 21, 1966: Pierre Salinger 57
October 9, 1966: Senator John Stennis 59
November 20, 1966: Floyd B. McKissick 59
December 11, 1966: Governor Robert E. Smylie and Governor John A. Love 60
January 8, 1967: Dr. James L. Goddard (Commissioner of FDA) 60
January 29, 1967: Senator George Murphy 61
February 5, 1967: Dr. Clark Kerr 63
February 12, 1967: Representative George Mahon 64
February 26, 1967: Barry Goldwater 65
March 5, 1967: Senator Mike Mansfield 66

PAGE

March 12, 1967: Attorney General Ramsey Clark 67
March 19, 1967: Senator J. William Fulbright .. 68
April 9, 1967: Senator Thruston B. Morton ... 70
April 16, 1967: Dr. Martin Luther King, Jr. 71
April 30, 1967: Edward Bennett Williams 73
May 14, 1967: Senator Russell B. Long 75
May 21, 1967: Senator Thomas J. Dodd 76
May 28, 1967: Senators John Sherman Cooper and George S. McGovern 76
July 9, 1967: Whitney M. Young, Jr. 77
July 23, 1967: Governor Richard J. Hughes 77
August 6, 1967: Senator Everett Dirksen 78
August 20, 1967: Sargent Shriver 80
September 3, 1967: Senator William Proxmire 82
September 17, 1967: Reverend James E. Groppi 83
October 15, 1967: Senator Stuart Symington ... 87

III. Selected CBS Documentaries

CBS News Inquiry, "The Warren Report," June 25-28, 1967 89
CBS Reports, "Black Power, White Blacklash," September 27, 1966 105
CBS News Special Report, "Civil Rights: The View from the South," July 12, 1966 114
CBS Reports, "Murder and the Right to Bear Arms," August 7, 1966 116
CBS Reports, "Robert F. Kennedy," June 20, 1967 119
CBS Reports, "The New Left," September 12, 1967 123

EXHIBIT

Collected below are excerpts from three types of programs broadcast over the CBS television network during 1966 and 1967 which contained statements that at least arguably constitute "personal attacks" under the Commission's new rules. These statements are indicated by italics.

Part I of the Exhibit consists of 31 commentaries by Eric Sevareid broadcast on the *CBS Evening News with Walter Cronkite* during a recent one-year period. We have reprinted these 31 commentaries in full to demonstrate how statements that may be "personal attacks" under the rules are an integral part of Mr. Sevareid's comments on current issues.

Part II of the Exhibit contains examples of similar statements that were made during 34 of the 85 weekly broadcasts of the CBS news interview series, *Face The Nation,* from March, 1966 to October, 1967.

Part III of the Exhibit contains more extensive excerpts from six selected news documentaries produced by CBS during 1966 and 1967 and broadcast in the *CBS Reports* series or as *CBS News Specials.* These represent examples of programs that treat all sides of important public issues fairly and objectively but which cannot keep the public fully informed without including many statements that may be "personal attacks" under the new rules. The personal qualities of individuals, particularly their honesty and integrity, are an important element in the reporting of their conduct, whenever that conduct becomes a matter of public concern. In some of the examples, a reply from the individual or group "attacked" is also carried on the same program, but as the excerpts show, it is plainly impracticable to do so every time a "personal attack" occurs.

I. ERIC SEVAREID COMMENTARIES (CBS EVENING NEWS WITH WALTER CRONKITE): NOVEMBER 22, 1966-OCTOBER 12, 1967

November 22, 1966

SEVAREID: November 22nd has become a more painful, poignant day of memory, yearly renewed, than Armistice Day or Memorial Day.

Mass tragedy becomes impersonalized after a time, but one man senselessly killed, one leader of captivating mind and personality struck down in the prime of his powers and fame, this is comprehensible tragedy and pain preserved.

This country shows few signs so far of getting over John F. Kennedy. His career in life and his moments of dying are revived like re-opened wounds in endless books and articles and pictures and in the running quarrel over the official conclusions about his murder, a quarrel ranging from scholarly, dispassionate reassessments to the most shabby, fortune-seeking literary racketeering.

Meanwhile the remarkable, indomitable Kennedy family and their friends have looked at the future and planned, very much like a government in exile as they have been called. And meanwhile, too, the man who took over the immense burden, steadied the country through the great emotional crisis, completed the social legislation President Kennedy had planned and much more besides, won election in his own right by the greatest vote in the national history, this man works at his Texas ranch and also ponders the future. He must feel a certain perplexity. After three years of extraordinary accomplishments, millions of voters have just given his party the back of their hand. And polls indicate that *a Midwest governor whose views and command of national and international problems remain obscure* could defeat Mr. Johnson were the election held today.

Back in Admiral Dewey's time, the Will Rogers of the period, Mr. Dooley, said: "Republics are not always ungrateful. Only when they give you much gratitude, do you want to freeze some of it or it won't keep." A gap has opened between President Johnson and much of the intellectual community and between him and most of the youth. The bloody and baffling Vietnam has much to do with it. But there is an additional cause for the disaffection of youth, always the most relentless of critics. They are bored when the President suggests they count their blessings. They feel only their pains. The reason is that youth is not equipped to measure from where we once were to where we are and see the progress or to measure across to other societies and see the contrasts as men of Mr. Johnson's age and experience instinctively do. Youth can measure only from now to their imagined ideals. If they could do otherwise, of couse, they wouldn't be youth and that, no doubt, would be a pity.

December 5, 1966

SEVAREID: The new wave of milling about at the University of California in Berkeley is probably symbolic of many things. Certainly symbolic of the truth that the battle between the generations like the battle between the sexes is a condition of human nature. It is ultimately unresolvable. If it were resolvable life would probably be much more boring.

An observation, of course, that does neither the striking students nor the fed-up University administration any practical good at the moment. But the distant observer does get the impression that many of the chronic demonstrators labor under the feeling that they are a "put-upon" generation. To those of middle age and older they seem, on the contrary, the most privileged college generation this

country has ever known. And maybe that's part of the basic trouble. At any rate, the class of 1917, let's say, or 1941, is not about to shed tears of sympathy for them.

Unless my history is off, the first real nationwide student protest movement was that of the thirties when the economy had broken down and fascism and war were rising in the world. We had our parades, demonstrations and mass meetings but my own memory is devoid of actions that forcibly prevented the physical functioning of the University administration, faculty or facilities. And it must have been a rare occasion in those days when passionate student believers in free speech tried to prevent others from speaking their piece as some Harvard students did to Secretary of Defense McNamara the other day.

The idea used to be that a—in the center of learning, coercion had no place; that reason and debate alone settled issues if they could be settled. The use of force can only beget the use of counter-force. It takes generations to build a university's qualities, it takes very little time to tear it down. Some Latin American universities are the best examples of the collapse of standards in both teaching and learning when control by students or government agents is allowed to expand. No law of history or nature says that the brain drain away from these Latin universities cannot be duplicated at Berkeley.

Beyond that it seems safe to say that *there is, at least, a small hard-core of students and non-student hangers-on at Berkeley who have no interest in rectifying wrongs but whose total interest, emotional or political, is in disintegration. And they have nothing concrete to replace what they want to destroy.*

December 13, 1966

SEVAREID: This political community requires constant drama to feel alive and it's been rubbing its hands in anti-

cipation of another hot time in the old town in the form of a public fight between Senator Robert Kennedy and G-man J. Edgar Hoover.

Each man is a national institution, *each possesses a powerful publicity machine, each is a gut fighter with, what is know around here, as the instinct for the jugular.* But today both men kept silence while Senator Long of Missouri announced plans to summon them next month to subcommittee hearing. The subject, of course, is the messy one of telephone wire-tapping and bugging electronic devices. Courts have been getting very concerned about the extent of this and some government prosecutions have been stalled because of the use of evidence obtained by these means.

Mr. Hoover says that Kennedy when he was Attorney General not only knew what the FBI was doing in this realm but that the practice expanded under Kennedy's tenure. Kennedy says that maybe he should have known about it but that he didn't. On the surface, at least, either the irresistible force, Mr. Kennedy, or the immovable object, Mr. Hoover, is telling less than the truth. The sub-committee hearing, if it comes off, ought to do very well in the audience ratings.

Of more importance will be the final resolution of this question of electrical and electronic snooping. It is both a moral and a Constitutional question. The Fourth Amendment says persons shall be secure against unreasonable search and seizure, so, what is reasonable. The Communications Act of 1934 forbids interception and divulgence of telephone communications. The FBI has gone on the assumption that if the communications were not divulged outside of government it was all right. Some state laws permit it if a court order is obtained in advance.

There is no federal statute covering non-telephone bugging. In '65, President Johnson issued an order prohibiting

bugging except in national security cases like spying and requiring express consent of the Attorney General. Mr. Kennedy was Attorney General before that order came along. Whether he gave blanket authority to the FBI to do what it was doing in criminal cases or whether the FBI assumed it had such authority from him, is presumably part of the current squabble.

The Long sub-committee is trying to frame new laws on this matter and the Supreme Court may soon clarify its own somewhat uncertain stand when it rules on a case challenging the New York State law which permits wire-tapping with a court order. It is one more example of the endless process of reconciling the Constitution with the realities of the technological age. A process that very often damages or enhances the reputation of public personalities.

January 3, 1967

SEVAREID: A few weeks ago the pathetic lost little creature named Jack Ruby was acting strangely in his Dallas cell. *"He's hamming it up," said the jailers. He began to breathe heavily. "A bad cold," said the jail doctors. Then he seemed really sick. "Pneumonia," said the doctors at first.*

Today Ruby died of cancer. *With rigorous, unbroken consistency Dallas officialdom fumbled to the end. Consider the record moving backwards in time: The other day Ruby's brothers smuggled a tape recorder into his hospital room right under the eyes of the policeman on constant duty.* Three months ago a higher court threw out the "murder with malice of forethought" verdict on Rudy because *his Dallas trial had been conducted so sloppily under such prejudicial conditions.* During that trial the courthouse was thrown into panic when several prisoners in the cells upstairs broke out. One of them using a pistol-like object made of soap. And on the day Ruby killed Oswald

he was allowed to mix freely with the police and reporters in the city hall basement. What was familiar was okay. The police had tipped off reporters and cameramen as to the time and place of moving Oswald to jail.

There's a first name cameraderie among Dallas authorities and all who hang about them. Jack Ruby, night joint proprietor, a quarrelsome, emotionally unstable person carried a pistol by right of a police permit to carry it.

Go back further. A few minutes after President Kennedy was killed, the policeman who ran into the Book Depository Building saw Lee Harvey Oswald in the refectory. "He's okay, he works here," said the man in charge. That was good enough for the policeman. *The man who was police chief when Oswald was killed continued in office a long time. The man who was sheriff when the absurd jail break occurred continued. So did the judge who presided over the tragic comic trial. All nice men, all well liked in Dallas. And that, so it seemed to me, at the time, was the heart of the trouble.*

Dallas is at the adolescent awkward age. It grew up too quickly. It is a metropolis in body but not yet in spirit. Government remains a personal thing as in a small town courthouse. With size and sophistication go formality, impersonality, rigid rules and standards. But Dallas officialdom hates to part with its breezy, informal, friendly, nicknaming spirit. And at the awkward age, very awkward things happen.

January 5, 1967

SEVAREID: It begins to look as if two men, not one, will dominate the scene when Congress gets back to work. President Johnson and his programs will be competing for attention with Representative Adam Clayton Powell and his woes.

Just what the House Democratic caucus will do about Powell's committee chairmanship or what the House itself may do about his seat in Congress seems very uncertain at the moment. *One thing is certain, whatever is done will not be done in an atmosphere of civic majesty, calmly and serenely proceeding to the administration of justice. It will be a donnybrook with mass meetings, packed galleries, the shaken finger and the beaten breast. Mr. Powell set the tone with his statement claiming that an enormous political conspiracy is out to get him in order to get at black people and black progress. That will be even harder to prove than the specific charges against Mr. Powell.*

Guilt is personal and most of the Congressmen who have Powell in their gun sights want to punish Mr. Powell, period. But Powell answers by doing what many an accused person has done. He generalizes himself. He transforms himself from an individual into a cause, an issue, a race, a section of humanity in history. He must win his fight, he says, in the name of coming generations of black children who will one day decide the future of this country. Translated that sentence seems to mean that Mr. Powell regards himself as the anvil on which the future shape of the United States itself will be hammered out. *Whether he reads that sentence with misty eye or mischievous grin is an open question to those who know him best. Along with the generalization ploy Powell's friends also use the singling-out ploy. This is the notion that an institution has no right to investigate or punish one man for wrongdoing when others are also suspected of wrongdoing. On this principal no policeman can grab the suspect nearest him on the grounds that other suspects are vanishing around the corner.*

The fact is that Mr. Powell singled himself out; repeatedly, so often, so publicly, over so long a time it became impossible even for fellow Congressmen who generally loathe these showdowns to sit on their hands any longer.

January 20, 1967

SEVAREID: This is Eric Sevareid.

The United States House of Representatives has by no means seen the last of Representative the Reverend Adam Clayton Powell. The betting here is that the committee of his peers who will sit in judgment will return him to his seat though not to his chairmanship. *In sum, Adam is expected to be allowed back into Eden but not to get his hands on that forbidden fruit again.*

Nor has the country heard the last of the Reverend. His direct pipeline to the Lord apparently failed him when the House was voting on his fate but he retains his pipeline to tens of thousands of his fervent followers and his voice is coming through to them loud and clear. *They remain convinced that his punishment was entirely the result of race prejudice* and he is not about to dissuade them. His recording ought to do well. *Senator Dirksen, who also implies on occasion that he is positioned just a bit closer to the right hand of the Almighty than the rest of us,* has done well with his recording. He sings of gallant men. He extols the high morality of men who exemplify the best in America.

Mr. Powell takes the opposite tack. He sings the cynic's song. All that counts is money. America has replaced the Holy Ghost in its new Trinity with God the Almighty dollar he tells his people. So get the dollars, get the green power. He is not being hypocritical here. He is not asking his followers to do something he has not been willing to do himself. That is the mark of a true leader.

His indictment of the American civilization does seem a bit sweeping. There was that little item of a civil war in which several hundred thousand Americans lost their lives and limbs because they believed slavery to be immoral.

But he has a point, nevertheless; it will not be lost on his Negro followers. It ought not be lost on white America either.

Someone recently calculated that if all Negroes in the South alone enjoyed the same education, the same opportunities to earn and to rise in their work that whites enjoy, the economy of the South would boom by an additional ten to twelve billion dollars. The great thing about green power is that it works to everybody's advantage, white or black.

January 24, 1967

SEVAREID: This phrase, *credibility gap,* has become a tiresome cliche already. But the very fact of its existence suggests that the condition is unusual. *It is unusual only in degree but I must say that in a quarter century of reporting Washington, I have never seen it in such high degree as this.*

My immediate fear is that the gap lies not only between the journalists and the truth but between our national leadership and the truth. I fear the intellectual lag. I fear that yesterday's truths are becoming today's dogma. Is Mao Tse-tung's China really to be compared with Hitler's Germany? Is Vietnam really today's Czechoslovakia? Does communism always and everywhere require physical containment or does it not have within itself its own built-in breaking mechanism, it own containment? Is it true today as the Administration believes and as seemed very true in the thirties and forties that peace and freedom are indivisible? Or is it the real truth that peace and freedom will continue to co-exist with war and tyranny as they have co-existed through most of human history? Up to what point is it the responsibility of the United States to try to renovate the economies, institutions, the ways of life of

distant and alien societies and can this, in fact, be really done? Is democracy an exportable item at all?

It is a basic faith of our foreign policy that peace, democracy and material progress are not each of them merely good in themselves but that they are interdependent. I try to find evidence from history that this may be so but I find very little. Talk of renovating, uplifting almost all the world, of creating what Secretary Rusk calls "a world order" to govern relations between the nations. But we are in and of the world with our due share of ignorance and sloth and fears, angers and prejudice, so much so that we have not been able to renovate our own society, the fearful problems of which pile higher and higher. Again and again, we have to remind ourselves of that truth that John Adams perceived as he walked this hill long ago. "Power always thinks it has a great soul." In that thought lies the secret of the terrible and sometimes fatal mistakes made by every great national power in the past. If our country is indeed the last best hope on earth, it is imperative that somehow, someway, America prove to be the exception in this long litany of power misused.

January 30, 1967

SEVAREID: The most scholarly student of foreign policy on Capitol Hill has recommenced his public seminar, open to anyone whose mind is still open to second thoughts about the vast and troublesome role of the United States as a world power. Senator Fulbright has the time and inclination to think about the fundamentals and about tomorrow while most Administration officials must fight their in and out baskets containing the passing but pressing miseries of the day.

Perhaps there was a time when a leisurely, philosophical inquiry into the fate of nations seemed a normal thing in

this capital. In today's busy world the Fulbright hearings seem incongruous and *to some observers, usually those who don't grasp the nature of the Senator's concern, he is being academic, fusty and fuzzy. To some others conscious that we are in the middle of a dangerous war he is a bothersome dog in the manger.* But there is no ideal time for a search into the national motives and if we are having a search in the middle of a war, it's because it is this war that has sparked the concern. We fight a war with no agreement about the nature of the enemy, whether it is communism in general, North Vietnam or the national power of China. And this new series of hearings has opened at a moment when the relationship of forces in the world seems to be turned upside down, vastly different from the postwar period in which the basic American policies of containment and interventionism were formulated.

As this inquiry opens the head of atheistic Communist Russia is formally calling on the Pope in Rome. As this inquiry opens the biggest nation in the world, Communist China, is tearing itself apart and may possibly collapse back into a collection of regional authorities. Our old alliances are wearing thin, our old identification with the principles of the United Nations seems to be wearing thin. Increasingly, said Senator Fulbright, today, America is becoming the sole judge of the necessity and the merit of its actions. One might add that a few years ago we knew what we were against as well as what we were for. Today we still know what we are for. What we are against, just why, just where, is the question.

February 14, 1967

SEVAREID: The CIA, Central Intelligence Agency, is a by-product of the Cold War era and America's uncomfortable, unfamiliar new role as a world military power. We

are perhaps the last big nation to get into the spy and counter-spy business in a large-scale sustained manner.

This agency has done many things well, some things badly. It is not a power unto itself as some nervous citizens think. But it does have a self-generated momentum behind it, *it does move quietly into areas and operations where its methods and usefulness are questionable to say the least.*

Last year it was revealed that some men working in the Michigan State University aid projects in Vietnam were CIA agents. Last year a research center at the Massachusetts Institute of Technology servered its financial ties with the CIA apparently to protect the Institute's reputation for integrity. At that time a Senate sub-committee studied the secret agency's role in university research. The Senators were not made aware that *for fifteen years the agency has been helping to subsidize a purely student organization, the National Student Association, a kind of confederation of campus governing groups. This has not involved research, it has probably not involved espionage, it has involved propaganda.*

When it began we were in a dangerous Cold War with Communist powers. Student conferences around the world were an instrument of Communist propaganda. Student delegates from Communist countries were chosen by those regimes and propagated the Communist line. Their amateur status was a joke, but every sophisticated person knew this. *What was not known was that some American student representatives were also being subsidized by government, through the CIA.* Many of those representatives themselves did not know this. But the amateur status of American students abroad like that of American athletes was supposed to be real and honest. It could be argued then that in this respect we have dissembled more than the Communist regimes.

This kind of operation at that level has almost nothing to do with the national security. Traditionally the CIA refuses to account to the public for its doings, pleading security, and rightly so in many cases. Today it again refuses to account publicly for its involvement in this student affair. But it may be hard put to keep its silence this time for this time *it can be fairly charged with expanding its mandate beyond reason or need.*

February 17, 1967

SEVAREID: A decade and more ago, any American had to be careful about the organizations he joined, the funds he contributed to, the public meetings he attended, the neighbors he had in his house, because the remotest connection with a Communist could ruin a person.

Today any American had better be careful about his organizations, funds, meetings and neighbors because his own government—in the form of the Central Intelligence Agency—might be involved somewhere. The god of history is obviously a humorist who loves practical jokes. When Washington can get itself into as big a lather over the secret operation of its own officials, as it got into over the secret operations of Communist enemies, it must mean something. Maybe it means that the Cold War is effectively over, the world a steadier, less dangerous place, human beings relaxing back into older, more comfortable habits. This is probably the only pleasurable lesson to be drawn from the uproar over the secret agency's involvement in the American student affairs.

Today the defense is having its day in court, so to speak. *The C. I. A. is letting out word that it was ordered to do what it did—and one can imagine its agents sobbing with grief as they accepted the hateful assignment.* Various senators and representatives on subcommittees that deal

with the C. I. A. say they knew about these operations all along and for the life of them can't see what's wrong. Mr. Allen Dulles, former C. I. A. chief, says the operations after all stopped Communists in the student area. What has stopped Communist advances among students is the same general trend that stopped Communist military, political and economic advances: their own excesses, military alliances against them; the rise of nationalism in the new countries, the magnetic attraction of prosperity in the Western nations and decisive episodes like the Cuban missile crisis and the great China-Russia schism.

Intellectual cloak-and-daggering among students has to be regarded as a wrist slap among blows for human freedom and by no means worth the compromising of organizations that stood for individual and intellectual freedom. It is the ancient argument about means and ends, about external threats to the nation's body and internal threats to its soul. *It was Adolf Hitler, if I remember correctly, who observed that a great strength of the totalitarian societies was that they obliged their enemies to imitate them.*

February 28, 1967

SEVAREID: Henry R. Luce died this morning in the new America, the arid, open, exciting Southwest, where this reporter has been spending the last few days.

Perhaps the key to this quiet, withdrawn publishing genius was his passionate curiosity about whatever was new, from a kitchen gadget to a religious conception. His mind lived constantly at the cutting edge of human thought and conduct. He may have been the greatest popularizer of ideas in this century, yet he did it without talking down to his readers.

Luce started from nothing and made a prodigious fortune. Perhaps the best description of him was that of a

friend, some time ago, who said Luce was a dreamer with a keen sense of double entry bookkeeping.

Luce was a tall, spare man with a quality of grayness about his face and dress and manner. He listened far better than he conversed. He was rather deaf and he used this as his protective device when he was bored with what was being said.

He was a visionary in the good sense of the word, with the maximum view of the United States and its potential for the human race. It was he who coined the phrase, "The American Century." Many men disapproved of his visions, not all liked the way he expressed them, but none discounted the boldness and force he put behind them.

He had a genius for choosing his reporters and writers, from courthouse cynics to poets of considerable quality. Periodically, he lost some of the most individualistic among them who objected to the system of group rewrite and what it did to their material, or who refused to write news according to a policy line handed down from the top.

His publications had a way of brushing with glamour everything they described. *Fortune* made businessmen see themselves as historic figures; *Life* brought the weekly news visually alive in a way never done before. *Time* made the most remote, provincial reader feel that he was on the sophisticated inside.

The enduring argument about Henry Luce has always centered on Time, which he labeled a news magazine. It strained in every sentence to avoid dullness, which often meant straining truth. It was a weekly casserole of intermingled fact and opinion, both fascinating and deeply disturbing when it began. Its style enlivened the language, and to some degree it caricatured the language. *Many journalists have always distrusted it;* nearly all have always read it. By any accounting, Henry Luce revolutionized journalism in this century. It took a big man to do that.

March 2, 1967

SEVAREID: Senator Robert Kennedy's great advantage in getting public response is his last name. His great disadvantage in getting response from the Johnson administration is also his last name. *If, by some magic, he discovered the perfect key for unlocking the riddle of Vietnam, President Johnson would suffer considerably before accepting it from Kennedy.* In his long and eloquent and far-reaching Senate speech today, Mr. Kennedy does not discover the magic key. He does add to the atmospheric pressure on this administration for suspending the bombing of North Vietnam. He begs that we take seriously the recommendations of Secretary General U Thant and Kosygin of Russia, who seem convinced that stopping the bombing not only can, but will, open the way to peace negotiations. Whether the president will directly acknowledge this speech at all is problematical. Secretary Rusk will respond with his familiar litany, that we must first know from the enemy what will happen if we make this concession. It seems fairly clear that Kennedy regards as the more ominous question, what will happen if we do not make this concession. And he quotes Edmund Burke: "Conciliation failing, force remains: but force failing, no further hope of reconciliation is left." So suspend the bombing, said Mr. Kennedy, tell the enemy we'll be at the negotiating table within a week. If they don't respond at once, maintain the bombing pause for a substantial period. Then re-examine the questions of bombing, and/or building some kind of wall across that country. If we get talks started, there should be an international team of observers to check on enemy moves to infiltrate and American moves to reinforce. There is no magic in his formula; he is simply saying take the chance and suspend the bombing. He thinks that what we may win is far greater than what we may lose, our professional

military, pro-bombers, notwithstanding. Mr. Kennedy employs the recent statement of Secretary of Defense McNamara, the one Kennedy appointee regarded as highly by the president as by the Kennedys, the McNamara statement that will be used again and again: "I don't believe the bombing up to the present has significantly reduced, nor would any bombing that I would contemplate in the future would significantly reduce, the actual flow of men and materials to the south."

March 3, 1967

SEVAREID: Secretary Rusk implies the Russians are sincere in wanting Vietnam ended by negotiations; but *the Russian President Podgorny, perhaps angered by the latest American intensification of the war, says that the Johnson Administration wants peace by military victory. Some United States Senators also entertain that thought from time to time; but to believe it is to believe the President guilty of an enormous duplicity.* It is also to believe that he expects victory, and soon; but he has said nothing to suggest that, and even the fiercer hawks have softened their once happy predictions.

The Senate debate yesterday, sparked by Mr. Kennedy's speech, avoided the issue of whether we should have gone into Vietnam in the first place. By the conventional wisdom around here that is a moot question, irrelevant to the problem of settling the war. But that question remains the ghost at the banquet and cannot be dismissed. The reason is that every suggestion for ending the war—withdrawal, retiring to fortified positions, destroying North Vietnam—all are related to the real value of the American stake in Vietnam. Because there is no agreement on that, there is no clearly preferable strategy. If for example Americans were overwhelmingly convinced that the integrity of South Vietnam

were essential to the security of the United States or to peace in the world, as Mr. Rusk used to suggest, then there would be very little hesitation about knocking out North Vietnam, China or the civilians notwithstanding. But we are uncertain of our course because we are uncertain of our case.

In some ways, the closest parallel to the Vietnam war is our war against Mexico in 1846. Ultimately it extended our boundaries to the Rio Grande and the Pacific Ocean, but it split the Congress, press and people as Vietnam has done. *It roused much of the intellectual community against President Polk, who was accused of duplicity and of manipulating Congress (notably by Congressman Abraham Lincoln) just as Mr. Johnson is sometimes accused.* Various West Point graduates resigned their army commissions rather than fight in the Mexican War. The young Lieutenant Ulysses S. Grant fought in the war but, according to his biographers, regretted that all his life. Vietnam is physical, intellectual, moral, political travail for the American people. But it has its precedent, if that be of any comfort.

March 7, 1967

SEVAREID: *Jimmy Hoffa, convicted by the courts, is in jail. By his drive, brains and boldness he reached one of the highest pinnacles ever attained in the American labor business and his methods cut him down. Adam Clayton Powell, convicted by the House of Representatives and fugitive from the courts, is on a sunny southern isle. By his drive, brains and boldness he reached perhaps the most powerful position ever attained by a Negro politician in this country and his methods cut him down.*

Hoffa is a primitive, a carry-over, an old-time street scrapper, surviving in an era of labor leaders with mani-

cured hands and uniformed chauffeurs. Powell is an educated, sophisticated man who could have been one of the greatest lawmakers of our time or the historic leader of the civil rights revolution. *But both men sneered at the rules which most other big men respect as they climb to the top.* And this raises the interesting question about them. Both men regard themselves as tougher and stronger than other men, and perhaps most Americans would agree. *But it can be argued that they were not strong men, but weak men. Impatience and flamboyance have nothing much to do with strength. The compulsion to win every battle, to admit no mistake, is not toughness but febrility. There are many ways to win and hold power and lasting honor in this country but all of them require a patient stamina these men did not possess. What John L. Lewis had, Hoffa did not; what Martin Luther King has, Powell did not.*

The brilliant, driving, but fatally weak personality is not new to history. Centuries ago Plutarch wrote this about the Roman half-hero Coriolanus, who lost an election: "He could not bear the affront with any patience. He had always indulged his temper and had regarded the proud and contentious element of human nature as a sort of nobleness and magnanimity. Reason and discipline had not imbued him with that solidity and equanimity which enters so largely into the virtues of the statesman. Straightforward and direct and possessed with the idea that to vanquish and overbear all opposition is the true part of bravery, and never imagining that it was the weakness and womanishness of his nature that broke out, he retired, full of fury and bitterness against the people."

March 14, 1967

SEVAREID: It is almost three years since the administration made an agreement in principle with Moscow that each nation could establish consulates in the other, out-

side of their respective capital cities. The concern of Mr. J. Edgar Hoover that this might give the Russians an extra advantage in the business of spying seems to be dampened down. *Now the chief opposition to the treaty around the country comes from the highly organized extreme right wing groups; the chief opposition in the Senate from men whose careers have been identified in large measure with crusading anti-communism.*

The agreement would give immunity from arrest to those consular officials themselves and allow them to step in to protect their own nationals, Russians who get into trouble here, Americans who get into trouble there. And far more Americans travel in Russia than Russians travel here. These protections would be enforced even if no consulates were physically established in either country. The idea is simple reciprocity in the familiar world-wide pattern. Before and during the big war the United States and Russia had consulates on each others' territory, but they were withdrawn at the height of the cold war.

The first negotiations for this treaty were begun under President Eisenhower and he continues to support the effort. Faced with rebellion by moderate Republican Senators, Republican leader Dirksen has essentially withdrawn his own opposition.

But a two-thirds vote of those present is required for Senate ratification of a treaty. When it became apparent that outright rejection of the treaty was unlikely, its opponents, like Senator Mundt, resorted to amendments, barring implementation of the agreement until Soviet aid to North Vietnam has ceased, for one thing. But this treaty cannot be used as a political lever on Moscow for the reason that it's not that important in the practical sense. The Russians would simply refuse to ratify on any such terms, as we also would refuse were similar terms applied to us.

In the practical sense the treaty is useful but not critical. But as a symbol it does have a certain critical air about it. Since the Cuban missile crisis and the Russia-China split, the cold war has taken a different turn. Nobody expects Russia ever to love or trust America, or vice versa, but in their own interests the Russians are trying to get on better terms with the West. Presumably, this is what we have always wanted. The administration looks on this treaty as a small step in that direction, as an earnest of our intention that the trend towards east-west cooperation shall continue, hopefully leading to much bigger things, such as a treaty to discourage the spread of nuclear weapons around the world.

March 17, 1967

SEVAREID: This is Saint Patrick's Day and according to to the rule book one ought to say something about the Irish. But the Irish can generally be counted on to take care of that themselves, particularly on this one day of the year.

It wouldn't do, on this day, to say that the news pastures are greener exactly on the other side of the continent, but exotic happenings do continue to bloom in southern California, where there's no politics like show business and no show business like politics.

The age of mass production produced the interchangeable part, and since the switch of Ronald Reagan to the governorship and George Murphy to the Senate it has been perfectly clear that the statesman need no longer be custom-made as in the old fogey days of long ago. Naturally the process works in reverse. *So Senator Dirksen has no trouble going into show business, recordings department, nor has Adam Clayton Powell. And Los Angeles Mayor Sam Yorty as a television compeer, raconteur and question answerer seems entirely natural, an appropriate development in na-*

ture's new scheme of things. After all, Yorty told the Ribicoff committee very frankly some time ago that a mayor in Los Angeles has very few powers. The next best thing to power is influence, and the next best thing to that is publicity.

In conversation many years ago the late Gertrude Stein explained to me that there was a new being in the world. She called it the "publicity saint," a person who didn't have to say or do anything that affected anything, but only had to exist in order to be publicized. Her leading example was Eleanor Roosevelt, which I thought inaccurate; mine was Bernard Baruch.

These days we have a whole new crop of publicity saints, though of minor orders. *At Mayor Yorty's ceremonial, it was natural that he would surround himself with those already beatified; no opening is regarded as complete any more without the presence of Mr. Pierre Salinger, for example. It is without point to ask what a publicity saint does. They don't have to do; they just have to be.* And only the most backward would ask Miss Zsa Zsa Gabor what she does, because she is, though purists in the study of this new species might quibble there. She not only is, she has.

April 18, 1967

SEVAREID: After his Latin American excursion in which he dealt with the complicated problems of the future, President Johnson is now immersed in the agonizing problems of the present. South America may be smoldering, but Southeast Asia is on fire.

Most of the large factors in the Vietnam war seem unchanged. Some military authorities here are implying that the fighting is reaching a decisive stage. They were saying that a year ago. Thousands of anti-war Americans have been massing in the streets demanding that we get

out of Vietnam. They were making that demand a year ago. High-ranking government officials are saying that Hanoi is encouraged to continue the war because of these protests in this country. And they were saying that a year ago. A spade is a spade; *the protestors and the government are calling each other murderers. This is the outer limit of democratic dialogue.* It is stark illustration of the decline of order, the loosening of the cement that holds this body politic together. *Another year of this and it may be questionable how much moral authority will remain vested in the presidency; it may also be questionable how much will remain vested in Martin Luther King, for one, who has now formally joined the war protest to the passions of the Negro revolution.*

But on the international, inter-governmental level, it would be wrong to say that nothing at all has improved. The rigid triangle composed of Hanoi, Washington and the Saigon regime does appear to have altered its shape. It is Saigon that has softened. Not long ago Marshall Ky was insisting on no dealing whatever with the local Vietcong; indeed, he was demanding the invasion of North Vietnam. Recently, when Ceylon proposed a standstill in the fighting and dealing with the VC, the Saigon regime accepted this. Today it accepted, in advance of Washington, Canada's suggestion of a mutual pullback from the demilitarized zone.

This does not mean that these things will actually occur. It may not mean that the ruling junta in Saigon has had a change of its private heart. What it means is that there are new forces at work inside South Vietnam, local political forces, represented by the presence of the temporary Parliament, and by the gathering election campaign. The generals are bowing to the spirit of these new groups and processes. That spirit is for compromise and peace. To accept that spirit is the way to win election, which tells us

a lot about the mood of the ordinary Vietnamese. In sum, one of the stubborn roadblocks in the path to peace is being reduced, and that is something.

April 27, 1967

SEVAREID: *The committee recommendation that Senator Dodd of Connecticut be formally censured is expected to be followed by the full Senate.* The committee finding was a unanimous vote of its respected members, and after *the severe punishment of Adam Clayton Powell on the House side,* it would be exceeding strange were the Senate to relent on Dodd.

There is a principle of randomness in politics as in nature; things come in clusters, *so we have had Bobby Baker, then Powell, now Dodd.* Each has intensified interest in the others and made impossible any sweeping under the carpet operation.

Every few years the Congress goes through some kind of crisis about members' personal conduct, so every few years there is a new effort to write some kind of ground rules on the use of government expense accounts and campaign funds, on acceptance of gifts from lobbyists, on conflict of interest between a member's public duties and his private business connections. It's an extremely difficult task, so fuzzy are so many of the borderline cases.

Congress is judge and jury, prosecutor and defense for its members. It has no separate watchdog, save the press. Men who labor in the executive branch do have a watchdog, the Congress. It has demanded the purity of Caesar's wife for administration people, and so have various presidents, including President Johnson. The result is that the federal administration is generally regarded as very clean, cleaner than most city or state governments. *But it is also very probably true that the federal Congress*

is cleaner that most of the legislatures in the states. The popular notion that congressmen are natural crooks comes from the experience of the 19th century and the early part of the 20th. It is a notion that many congressmen privately but bitterly resent as they go quietly broke in office.

Their mail from constituents these days has been full of epithets, *and they are scarcely in a charitable mood toward Powell or Dodd, and very uncharitable toward Dodd's office staff people who rifled his files while working for him. And if these people now receive some attention from the Justice Department, most senators will not be displeased.* They all have an office staff of their own.

April 28, 1967

SEVAREID: The square-shouldered, square-jawed General Westmoreland mounted the tribune today, but not as a hero with victory to report; he came more as an emissary of the fighting troops and he was as much sympathized with as admired, for he struggles with what may be the most difficult, unglamorous assignment ever given an American commander. No one can be sure that his war of attrition, his search-and-destroy strategy, is the best strategy in Vietnam because no one can be sure about the hypothetical alternatives; but the Congress gives him the automatic benefit of the doubt on this, partly because it knows he fights under severe and necessary political restrictions.

His speech today was more of a factual military report than his speech to the editors on Monday. It was a softer speech. He did not talk about "unpatriotic acts at home" as he did on Monday; he merely said that the enemy believes that America's resolve is its Achilles' heel.

It has been clear since Monday that if the Administration thought Westmoreland's soldierly presence would tend to silence the critics and draw the country closer together,

behind the President, if it thought that, it was wrong; the effect has been the opposite. In his speech Monday, if not today, he exacerbated the argument. *Congressional critics don't enjoy being called unpatriotic, even if only by loose implication; if the general meant only the flag and draft card burners, everyone wishes he had said so.*

Today's speech was much more carefully vetted in Washington than his Monday's speech. When he said on Monday that he could see no end to the war in sight, he intensified the domestic debate; he did not diminish it, because there are many potential hawks who have restrained their desire to smash up North Vietnam because of the thought that military victory in the field may be close at hand, and there are many potential doves who have restrained their desire to appease Hanoi or get out of Vietnam because of the same thought.

Now with the war's commander stating flatly that the end of the fighting is not in sight, men on both sides of the domestic argument will feel less restraint, and will go at it hammer and tongs.

May 2, 1967

SEVAREID: It is not likely that President Johnson or Secretaries Rusk and McNamara will be losing any sleep over their so-called trial for war crimes, which opened today in Stockholm. The effects of gratuitous insults generally wane rapidly.

This affair in Stockholm is an anti-American propaganda ploy. It is being staged there because the bulk of the British left wing wanted nothing to do with it, and because de Gaulle would not permit it to take place in France. Even the Soviet Union allows very little publicity about it. But many fiery denunciations of Washington will come out of it, will be printed and broadcast around much of the

world, finding some believers, and having a reverse effect on others because of the sheer blatancy of the business.

It would receive almost no attention were it not associated with the name of Lord Bertrand Russell, though he will not attend in person. Lord Russell has been one of the shining intellects of this century, whose works will be studied for generations. He is now 95 years old. From his home in Wales he operates what one journalist has called a protest factory. Statements protesting almost anything, in particular almost anything the United States government says or does, pour out under his name. *Much of it is the work of a tense, humorless young American expatriate named Ralph Schoenman, one of a small band of far left Americans, some of them committed Communists, who have operated in England for several years.*

Some who know him argue that Lord Russell is not at all senile. But his stability might be judged by the facts that he once called both President Kennedy and Prime Minister Macmillan murderers worse than Hitler, that at one time he advocated preventive war against the Soviet Union, that *he regards the Warren Commission Report as a part of a giant conspiracy,* that he claims the United States has put 8 million Vietnamese into concentration camps. That, incidentally, would be one half the population of South Vietnam.

If the Vietnam war is an affront to reason, for many people Lord Russell's brand of opposition to it is a mutilation of reason.

May 4, 1967

SEVAREID: What follows scarcely comes under the heading of pointing with pride or viewing with alarm; it occupies that misty middle ground called pondering with perplexity.

What is a bit perplexing these days is the number and variety of Americans busy writing higher laws. *The draft card burners are responding to a higher law, they say, than the Selective Service Act; leaders of various street demonstrations are invoking higher laws than city ordinances governing traffic and public order. If things get much worse the scholars will have to write a new definition of anarchy.* It won't mean the absence of law any more; it will mean a superabundance of laws, with every citizen free to choose those he feels like obeying. A country can grow rich in saints and martyrs that way, but a boom market in self-conscious morality is bound to crash sooner or later.

One of the higher laws developing these days among some of the civil rights demonstrators seems to be the rule that unless there is bread for everyone there shall be no cake for anyone. So Dr. Martin Luther King argues that because the housing situation in Louisville is bad, Louisville doesn't really deserve to have the Kentucky Derby and some of his young followers entertain notions about breaking it up.

At Darmouth College several hundred students have discovered a higher meaning to the constitutional guarantee of free speech. It means the freedom to howl down anybody with a different view and to threaten him with bodily harm, as they did with ex-Governor George Wallace. These students are quite certain their morality is higher than Wallace's, a proposition now open to doubt. Their unspoken conviction is that the young and left-wing are naturally pure; the middle-aged and right-wing naturally impure. It all leaves bewildered citizents groping hopelessly to find the difference between the students who smashed Wallace's car and that Dallas woman who spat on the late Adlai Stevenson, the difference between today's left-wing intimidation and yesterday's right-wing intimidation by McCarthyism.

The McCarthyites, too, were following what they conceived to be higher laws.

The spectacle of the more self-righteous young students these days irresistibly brings to mind a remark once made by Winston Churchill. He said he admired a manly man and a womanly woman, but he said, "I cannot stand a boyly boy."

June 15, 1967

SEVAREID: The Senate of the United States is not a chowder and marching club at the best of times, and it reaches its most joyless level when it must sit as a court in judgment on one of its members. It is a court of 100 this week, since Dodd of Connecticut can vote on his own case, and all its proceedings are conducted in the spirit of more sorrow than anger, *except on occassion when Dodd's defender, Long of Louisiana, turns purple of complexion, matching his prose.* The transaction has none of the atmosphere of a criminal case, though money is the subject matter. No member seems to be thinking of the defendant as larcenous. *The alleged misdeeds at issue are in the realm of carelessness, but on a scale beyond normal proportions. Senator Dodd appears to have been afflicted with what one observer here calls a "splendid inattention to detail."*

Any senator is part individual, part institution, or so he feels. In the Orient, individuals dare not lose face; in the West institutions dare not, and *the offense Mr. Dodd is charged with by the Ethics Committee is damage to the repute of the institution.* Senators are painfully aware that there is always a layer of the population that regards legislators as crooks, which is not often true, and the House chamber did what it did to Congressman Powell, which adds to the pressure for action on the Senator from Connecticut. So the highest authority appealed to by Senator

Stennis, spokesman for the prosecution, is the Senate, while the defendant, whose personal honor and soul are at stake, has called upon the Lord as his witness. Mr. Dodd has defined himself as technically responsible, but not guilty. It is conceivable that the senators will vote on the two questions, double billing for airplane fares and using testimonial dinner receipts for personal needs, that they will vote on them separately. This could result in differing verdicts and leave Mr. Dodd's status about as cloudy as the issues are now. The great difficulty is that there are no written rules about how testimonial dinner monies should be used, only for political purposes, or are they to be regarded as personal gifts to the senator? The verdict on Dodd ought to lay down the precedent on this matter, so the Senate seems to be using Mr. Dodd as a guinea pig as well as making him an example.

Dodd himself has no doubts as to where the line on money morality is drawn. *If he had bought minks, a Cadillac or a yacht, he implied, that would have been wrong; this suggests that rabbit fur, a Chevy, and a rowboat are more respectable.*

It is easy to identify part of the senator's appeal to his constituents. He looked so augustly senatorial, and yet was always so spectacularly broke.

June 21, 1967

SEVAREID: *The remarkable young man known as Muhammed Ali or Cassius Clay had an unconvincing case for refusing military service, and apparently expected to be found guilty.* Had he won his case there would certainly have been widespread resentment on the part of other young men who do serve, to say nothing of the families of those who have found injury or death in the service. Yet for any one who has known and tried to understand this young man, there

must be a sense of regret and loss over what he has come to, and a sense of shock at the severity of his sentence, because there is a large core of goodness, of high morality, in this young athlete. This will sound strange to those familiar with *his public posturing and boasting and vainglriousness.* That side of his nature has existed in contradiction to his private gentleness, his acts of generous concern for his friends, his family, and especially for the Negro youngsters who idolized him.

Beginning at a very tender age, this phenomenal boy had to bear a tremendous weight of public attention. He was bright, highly emotional, but woefully uneducated and confused about just who he was and what it was all about. In spite of his family background, he was uprooted in a different and more drastic way than most young Negroes in the American society. He had to find something he could cling to, and *he found it among the black muslim sect, and what they regard as their faith. He seemed to feel that this had brought a coherence to his life; it has now brought him to the gates of prison.* He has turned his tremendous energies into the direction of deliberate martyrdom, as have some others trying to lead in the national Negro upheaval. It is hard to see that this advances their cause to a lasting degree. It is permissible to speculate, at least, that the leadership for the long haul will come from the ranks of those who work within the rules and find their lost pride in contexts that the whole country, not only militant Negroes, accept and understand. And if there is one obvious group of Negroes now accomplishing this, it is those young men who took the opposite road from Muhammed Ali—the Negro privates, corporals sergeants, officers in Vietnam. In battle, color has no meaning to anybody; all that is respected is competence and the ability to lead. And it is in this strange war, dubious as its purposes and outcome may be,

that Negro Americans are establishing a record that has to be respected, producing individual leaders whom Negroes generally will have to listen to and look to in the generation ahead.

June 27, 1967

SEVAREID: This is Eric Sevareid. *President Johnson indulged his pet peeve in Baltimore today. He blew in public the gasket he usually ignites in private gatherings.*

Practically all Presidents begin by feeling the press is a thorn in their flesh; practically all of them acquire the feeling it is a sword in their side. Some have left office convinced it is a knife in their back. Mr. Johnson seems to have achieved stage three already.

When Thomas Jefferson left office he was reading only one paper, the *Richmond Inquirer.* He didn't trust the contents of the others, except for the advertisements. President Eisenhower, midway in office, concentrated on the *New York Herald Tribune;* it saw things his way. In recent months, both Mr. Eisenhower and Mr. Truman have been advising President Johnson to ignore the press, print and broadcast, and just go ahead and do what he thinks is right. That is as hard for Mr. Johnson as lifting himself by his bootstraps, too hard for a man with the habit of devouring newspapers and broadcasts, and *who wants to regard the press as the creator of both the credibility and the likeability gaps.*

Mr. Johnson is a positive thinker. Accomplishments should make news as exciting as failures or protests he feels. Antiwar protestors who tramped around the Pentagon got attention, while 10,000 young Americans enlisted in the armed forces and got no attention. Well, news is what editors decide it is, and they can and do fall into ruts at times. But the theory, or the instinct, is that news is what

is different and unusual. Protestors trampling the Pentagon tulip beds is regarded as something unusual, army enlistments as usual. Suppose it were the other way around and army enlistments got headlines and pictures as extraordinary events, while tulip tramplers were ignored because they were ordinary events. This would surely mean that American society was in a dreadful state, to say nothing of its tulips. The argument can be carried too far, but as a working hypothesis one can say that a nation that features bad news is probably a good and sound nation; one that features good news is likely to be a badly run, unsound nation. The press of most totalitarian countries is full of good news.

Intellectuals, especially those in alien countries, get mixed up about all this. Ordinary people don't. If all barriers to emigration and immigration were suddenly lifted all over the world, there would be a mighty movement of peoples, most of it in one direction, toward this country, in spite of all those awful things its own press and the foreign press have been saying about it.

August 31, 1967

SEVAREID: The assemblage in Chicago that Mike Wallace is reporting looks more like a camp meeting than a political operation to most people here in Washington. Conceivably the framework of a left wing third party on the national, presidential level could be put together but probably not much more than a framework. The money, organization, and leadership required for a third party to have any influence, to say nothing of winning any electoral college votes, must all be of a high order, and the assembly in Chicago doesn't appear to have even a candidate.

They are finding unity in a general state of mind only, not in a program or personality. At least they know they are

against the war and against the President, and in favor of rapid progress toward equality for Negro Americans. But they seem to differ vastly in their ideas of how to reach their goals. They are mostly young, of the "you can't trust anybody over 30" vintage, but they don't appear to be terribly trustful of one another either. That is one trouble with intellectuals in collective politics; the imagination that allowed them to see great goals also obliges them to see a thousand shadings of philosophy and policy. They can fragment a major issue into minor issues with alacrity and conviction. Mike Wallace reports that the Chicago gathering is surprisingly devoid of both structure and passion. *The last left wing third party effort organized in Chicago was Henry Wallace's Progressive party in 1948, which I was covering for CBS NEWS. It was the precise opposite, highly structured, intensely passionate, in part at least because it was dominated by Communists,* of whom very few are in Chicago now.

Unless an unlikely miracle happens in Chicago over the next few days, the real third party danger to President Johnson next year will come from another Wallace, George, of Alabama. A danger to Mr. Johnson, but perhaps even more to the Republican party in the South. George Wallace can't possibly win, but it's still conceivable that his movement could deny a clear electoral majority to either major party candidate and throw the presidential choice into the House of Representatives, and that would mean a combination camp meeting, fishfry and Donnybrook wondrous to behold.

September 5, 1967

SEVAREID: There is a theory that husbands can achieve happiness in marriage if they will frequently repeat those three little words, "I was wrong." Normally ambitious

politicians, like military generals, find themselves unable to utter those words, but now Governor George Romney has done it, and it will be interesting to see if he can achieve his nomination ambitions by this reversal of political tradition.

He was wrong, he now says, when he endorsed the Vietnam war after a trip there two years ago. That is as far as his humility goes in this instance. He appears to put the blame on American officers and diplomats in Vietnam who, he says, brainwashed him. But then, he went on, he went to the books and really learned something about this war, the Communist movement in Vietnam and the long history of that little country, and as a result he no longer believes that our massive intervention was ever necessary to save Southeast Asia from Communist and/or Chinese domination. He now believes we have in effect created the conflict and also involved other Asian countries in it.

In now denying the very validity of the war, Romney has broken the pattern of all the potential presidential candidates. None of the others has gone anywhere near this far. But Mr. Romney has joined a distinct and growing pattern involving scores of other serious-minded citizens, in Congress and out, who did not make a sustained independent effort to examine the basic flow of history in Southeast Asia until it was too late and our massive commitments made. This is what can happen when there is no formal declaration of war, formally debated, when the simple possession of mobile power tends to make action easier than thought.

This current wave of deep doubt about the war's justification is usually regarded by high officials here not as evidence of an enlightenment, but as a failure of nerve. A weakening of will when the going gets tough, they usually call it. This does not appear to be a very precise diagnosis.

The tough going has simply forced the tough re-examination of premises. The operative doubts today are not about the will or character of the American people, but about the wisdom of the official policy.

September 7, 1967

SEVAREID: This is Eric Sevareid in Washington. In this political world, when you can't solve a problem, you divide it. Another wall, of a sort, remindful of the line in Korea, the Berlin Wall, and the wall that did exist in Jerusalem, in going to go up between North and South Vietnam, built by American military engineers. This one will be barbed wire and electronic warning devices. General Westmoreland has resisted the idea for two years, feeling the troops could not be spared for it. Either he has enough men now, the many rear echelon bases having been largely completed, or he has been overruled.

Secretary McNamara denies, however, that we are going to an essentially defensive strategy in Vietnam, as so many have urged for so long, the latest being Sir Robert Thompson, Britain's leading expert on Vietnam and guerrilla warfare. But this announcement today is at least the first step in the direction of a defensive strategy. No word as to whether the fortified line would extend through Laos, where the best established enemy infiltration roads lie. If it is extended all the way, that would mean in effect handing northern Laos over to the enemy, perhaps for good.

This was the important McNamara statement today. *The remarks that will produce the real fun and games, of course, were those about Governor George Romney, who, says McNamara, an ex-auto manufacturer himself, is blind to the truth.*

Romney, as you know, claims American officials in Vietnam brainwashed him into supporting the war two years

ago. This shows signs of becoming one of politics' immortal remarks. It may not be quite on the scale of the run, Romanism and rebellion remark that booted a presidential election in the eighties, but it will have a life of its own, and could conceivably cost Romney the nomination. Today everybody is hammering at him, columnists, commentators, Democrats and even some fellow Republicans, notably Mr. Nixon's campaign chairman. President Johnson is saying nothing publicly, but is reported to be enjoying the spectacle.

At least the remark has landed Romney back on page one, and he had been slipping off. All prophesies about American politics are dangerous, so it is much too soon for anyone to conclude that Romney's chances are fatally damaged. The important fact remains that he is the only candidate who has flatly denied the usefulness of this war. All the others support it in one way or another, and it's interesting to imagine what [position] those others will take should the war be ended in this next year. As critics of President Johnson, they could find themselves finessed, out on a breaking limb, and Romney could stand clear with the argument that the war was never worth it in the first place.

Well, speculation is free, and like most free things, not worth very much. A year is a very long time amid the wild pleasures of American politics.

September 12, 1967

SEVAREID: This is Eric Sevareid in Washington.

The start of a national custom ought to be news, and it looks as if a new annual custom started today with the children's carnival on the White House grounds. It may be that sociological viewers with alarm will see ominous parallels—caliope playing while Rome, Newark, Detroit and East St. Louis burn, or pastoral gamboling, Versailles

fashion, *while H. Rapspierre Brown teaches guillotine building in New York schools.* But if the custom is still with us next year and the year after, we may consider that the republic has survived this era of do-it-yourself arson and oratorical buncombe.

Not that the cheerful custom won't run into troubles. Today the fair was for the children of cabinet, court, congressional and federal agency notables. It will probably be denounced as an establishment carnival and next year be countered by a protest demonstration in Lafayette Square, led by the offspring of civil servants just below the appointive level. Or it may be denounced as an example of militaristic imperialism since the Marine Band provides the music. *Back in the 30s, after all, the American Communists denounced the Boy Scouts as an instrument of fascism.*

Apparently this fall carnival is to be in addition to, not a substitute for, the springtime Easter egg roll on the White House grounds. The carnival probably originated with a presidential task force charged with thinking up new traditions, but the egg rolling affair has a long history, evolving out of the ancient Scottish ritual of rolling oat cakes down a hill at Easter time. In Scotland, anything easy is regarded as immoral, and the oat cake is not what one would call a natural roller, nor is the egg.

The egg rolling custom escaped congressional investigation. This autumn carnival may not. Great cities are struggling to get classrooms opened while teachers strike by the thousands, federal appropriations to encourage education run into billions, yet the President invites all these kids to a carnival on a school day. In our time, any kid who handed the home room teacher a written excuse for an absence which said "went to a carnival" would have done after-class time at the blackboard for five days running.

If the carnival is a Johnsonian masterstroke for increasing the future Democratic vote, this can be offset by the adult White House gardeners. The reports are that they are going Republican in a body.

September 13, 1967

SEVAREID: This is Eric Sevareid in Washington. From the general drift of Republican talk these days the innocent bystander gets the impression that *the Republican strategy for next year will be to head off the Johnson war party at Credibility Gap. Governor Romney thinks the administration has been brainwashing everybody, Governor Reagan says a new credibility gap has developed, Richard Nixon implies that practically no foreigners anywhere trust the United States any more.*

The average country gets along with just one credibility gap, but since the United States does everything wholesale, in job lots, we are developing gaps everywhere one looks, including one-man, do-it-yourself credibility gaps like Governor Romney's. But two major gaps have emerged. One is the believability of the administration when it explains the situation. The other is the believability of the Republican leaders when they explain the remedies for the situation.

House Leader Gerald Ford, for example, on the Vietnam war. Succeed or get out is the correct formula, he says. Since no one in power knows just how to do either, this hasn't helped very much. Demand that the South Vietnamese army fight harder or else, says Mr. Ford. Endless such demands have had no particular results in the past, and Mr. Ford does not explain what "else" means. Maybe he means we should court martial the Vietnamese army.

California's Senator George Murphy, for example. Unleash our military leaders, he says, and the war would be over in a month. Since no military leader in this capital makes this claim, to the President or to the public, Mr. Murphy can enjoy exclusive rights to his own gap.

California's Governor Reagan, for example. Sharply escalate the war, he says. Unless he means invading North Vietnam, which would double our trouble, this must mean knocking out or blockading the ports of the north. Quite apart from the risk of producing even heavier Russian involvement, the fact is that no military leader here, whatever the color of his uniform, has been willing to say "yes" when asked by the President if neutralizing the ports would produce a radical change in the course of the war.

But no one can fairly criticize these Republican spokesmen for lack of leadership. They seem to be way out in front, ahead of the admirals and the generals.

September 14, 1967

SEVAREID: The most basic, primitive political issue of all is law and order, the physical safety of citizens. All other issues fade when that issue becomes dominant, and the dominance of that issue in any country means automatically that the country is in real trouble. It's at least conceivable that the law and order will be the determining issue for next year's national election, though it did not become that in the '64 election, in spite of Mr. Goldwater's efforts.

Today President Johnson touched a national nerve and accepted a challenge. For nearly two months there has been no impressive statement by the President about crime and mass violence in American cities, and everywhere in the country a strong but vague feeling has persisted that he should have said and done more, especially about *the demagogues like H. Rap Brown who have been, in effect, yelling*

fire in a crowded theater. "Poisonous propagandists," Mr. Johnson called such men today, men who provoke others to destruction and themselves flee the consequences.

The challenge he accepted was laid down two weeks ago by Republican congressional leaders, including Dirksen and Ford. They accused the Johnson administration of retreating from the problem of crime and violence, of losing the war against crime. They were immediately answered by administration officials who accused them of scuttling Johnson—proposed legislation on crime, and of trying to help with nothing more than partisan press releases, and the President echoed this countercharge today with an expression of scorn for those who only make speeches and get their pictures taken talking about crime. As to the riots, he made his basic philosophy clear. They are not to be treated as any part of the civil rights movement in this country. They are to be treated as criminal acts. No matter what the sociological and psychological root causes of the riots, the riots themselves are not to be justified.

And the President found it necessary to remind the people of something we tend to forget, that in the American system order in the streets has always been considered a local responsibility, that most big cities have more policemen than the entire federal government, that America, unlike much of Europe, possesses no national police force. The men who founded this nation saw in such an institution an instrument of tyranny. But it may be that in time we will have to reconsider that proposition.

October 12, 1967

SEVAREID: The Secretary of State of the United States is 58 years old. He has had the office longer than any man in this century save Cordell Hull. Unlike Hull he has no personal constituency among senators. He values more highly

the esteem of the academic intellectual community from which he came, and has lost much of it. Dean Rusk is smoking more, talking louder, and enjoying it all less. He has also gone broke in office. He hangs onto office for the history books, to vindicate his Vietnam policies before stepping down. In the course of his painful pilgrim's progress he, like many others in the State Department and White House, has developed a loathing of academic critics, particularly those who assume peace negotiations will begin if only we stop bombing North Vietnam. To Rusk, all the real evidence is the other way.

His life experience has oriented him more towards Asia than any previous Secretary of State. He was assistant secretary, once, for the Far East, and believed the North Korean attack in 1950 meant that Stalin was willing to risk World War III, a proposition now deeply doubted. Earlier, in World War II, Rusk was a political officer on General Stilwell's China-Burma-India staff. Around the end of the war, Dean Rusk was one of the men organizing the dropping of supplies to none other than Ho Chi Minh in Vietnam.

He was Secretary of State during the Bay of Pigs and the Cuban missile crises. Just where he stood on either issue remains something of a mystery. The same cannot be said of Rusk on Vietnam. He is positive, adamant, unchanging.

The pent-up passions in this tired, courtly Georgian burst out today. Heat was added to the general argument here, but no light. He said what he has said over and over again. The argument remains stuck on dead center, because the core of the debate is not so much over strategies for peace or victory as over basic premises. Rusk is baffled that intelligent men cannot understand that Vietnam is

vital to our security. They are baffled that Rusk cannot understand that Vietnam is no such thing.

Things have reached the point where one feels justified in making the otherwise presumptuous statement that no office-holder, congressman or citizen has a right to be listened to any longer unless he has thoroughly studied the history of world Communism these last 20 years, the history of modern China, the Vietminh, Vietcong movements, and the story of the French experience in that country. Rusk has, but so has Fulbright. It is not a matter of who is better informed, but who draws the truest lessons from the information.

II. FACE THE NATION: MARCH 13, 1966-OCTOBER 15, 1967

March 13, 1966: Representative Melvin Laird

* * *

Representative Laird: . . . . But I would like to tell you one thing.

That is, that the defense needs of this country are being under-estimated. They were under-estimated in the President's budget of 1966 when it was originally submitted by some $15 billion. The supplemental request which we will act upon in the House of Representatives on Tuesday or Wednesday of this week—I think the American people were led to believe that that was all the money that would be necessary for the remaining portion of fiscal year 1966. It is simply not true. We will have another supplemental bill for defense spending even to cover military pay before us within a very short period of time.

The 1967 budget, Martin, is under-estimated again. As a matter of fact, the Army manpower limitations that were

in that 1967 budget, two days after the budget was submitted to the Congress, had been removed, making that budget out of date.

Mr. Agronsky: *Are you contending that the President, that the Administration is deliberately misrepresenting both the monetary and manpower needs of this war to the American people today?*

Representative Laird: *No. They want to finance it on a supplemental basis instead of a pay-as-you-go basis—they want to come in on a supplemental basis and have refused in 1966 to estimate adequately what the needs would be in Southeast Asia, as well as the needs to meet the other defense requirements which we have all over the world.*

Now, this is done for one reason, and it is important to get this point across. It is done so that the other programs of the Great Society can be funded in the budget. And it is done because they know the Congress will always come along and finance national security and defense needs at a later time.

Mr. Agronsky: *Well, if it is not misrepresentation, what do you call it?*

Mr. Herman: Yes, that is the point. There is a complication of language in here which I am not sure most of the audience will get. You say they want to do it on a supplemental basis. I don't think most Americans know what a supplemental basis means. You mean that they are under——

Representative Laird: Well, they don't want to put it in their budget estimate.

Mr. Herman: They are under-stating it originally.

Representative Laird: Now, in 1966—they are understating it. Take this fiscal year in which we are currently.

Mr. Herman: *Deliberately under-stating it.*

Representative Laird: *Deliberately under-stating it, I believe.* And I have so charged over a period of the last few months.

Back when the Defense bill was up in 1966—for the 1966 fiscal year, we filed a minority report stating that the defense needs were under-estimated, and we made this very clear in our minority views. *This is done deliberately so that the American people get the first impact, as they did in the 1966 budget, when it was announced that it was going to be under $100 billion.* There was a great hue and cry all over what a grand job the President had done in submitting a budget less than $100 billion. *Those of us on the Defense Appropriations Committee—and we so stated in our report—knew full well that this was a phoney figure,* because the defense needs were not adequately estimated, not a single dollar was put in the bill to carry on for the escalation of the war in Vietnam in the submission that was made in January for the 1966 fiscal year.

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March 27, 1966: Representative Gerald R. Ford

* * *

Mr. Novak: Would you campaign for *an out-and-out segregationist, like Strom Thurmond or Jim Martin?*

Representative Ford: I don't think you can categorize these people as outright segregationists. I think this is an unfair accusation. And I believe——

Mr. Schoumacher: *Is it unfair to call Strom Thurmond a segregationist?*

Representative Ford: Let me talk about Jim Martin, because he serves with me in the House of Representatives. I know that Jim Martin and the other Republicans from the State of Alabama worked very closely with me and others

in the House to develop a voting rights bill that even today, Dave, I think it a better bill than the law that we have on the statute books. These men worked very effectively and honestly to come up with a voting rights bill that would be applicable in every one of the fifty states. And any man or any group of men, such as Jim Martin and the others, who take this approach, in no way, no way, are the kind of segregationists that you are implying.

Mr. Novak: There are different kinds of segregationists?

* * *

Representative Ford: I think the prospects, Dave, are getting better and better for the Republicans to make significant gains in the House of Representatives. At the moment I do not think the prospects are such that we can look forward to a majority in the House. But public opinion today is rapidly swinging away from the Johnson-Humphrey Administration, and there is greater and greater Republican support throughout the country. *And if the Administration's credibility erodes in the next few months as it has in the last few months,* there is a distinct possibility the Republicans will gain control in the House.

I happen to think we are laying a good groundwork, we are getting good candidates, we are better organized, we are more unified, *and the Democrats are losing credibility,* they are disorganized, and I think the American people are getting sympathetic to the kind of a program and the candidates we are offering.

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April 17, 1966: Senator Vance Hartke

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Mr. Agronsky: *Senator Hartke, when you say that the American people need more light about our policy in Viet-*

nam, do you mean that President Johnson has not been sufficiently candid about American policy there?

Senator Hartke: I think all of [us] recognize today that there is a deep-seated feeling in South Vietnam that we are not especially well liked over there. It has become quite evident. Now this not something new. I think that if anyone had read Marguerite Higgins' book, the late Marguerite Higgins, that you could have easily seen this. And it is unfortunate that she died before someone had a chance to really answer these questions.

Now, either one of two things is true. Either the pipeline of information from Vietnam has been clogged up and the information is not coming here or *otherwise somebody on that end or on this end has not told all the people of America what is the truth about the attitude of the South Vietnamese people toward America.*

I think that Ambassador Lodge, the number one man in that part of the country, owes an explanation to the American people. He is over Westmoreland. He is the President's—he is the President's representative there. He is one of his advisers and if his advice has been bad then I think the American people should judge it accordingly.

Mr. Shaffer: Senator, do you think Ambassador Lodge should be recalled from the embassy there in Saigon?

Senator Hartke: I think this is a decision for the President but *I do think he owes the American people an explanation.*

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May 1, 1966: Senator Eugene J. McCarthy

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Mr. Bell: Senator, what is your chief complaint against the way the President is running the war at this point?

Senator McCarthy: Well, I think along the way I would have made two complaints. I don't think the explanations

that have come to us along the way have been as solid as they should have been. I think the kind of forecast that the men would be out in '65 by Christmas. This is the kind of a statement which should not have been made. There was talk last year that the Monsoon Season would be the critical time and that after this we would expect some significant change in policy. Now the Secretary of Defense is talking about the Monsoon Season again as though this had some great significance. I don't think it had significance last year and I don't think it's as significant as they are making it out to be now. We are setting up kind of absolute, almost absolute standards by which we are supposed to be guided, and then having these one by one somehow show weaknesses.

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Mr Morton: Senator, you mentioned these Administration predictions that didn't pan out, *is this, do you think, a lack of candor on the Administration's part or was it just that Secretary MacNamara, for example, was badly informed about how the war was going?*

Senator McCarthy: *Well, I would not charge them with lack of candor, but I think it indicates a kind of rashness on the part of the Secretary of Defense,* at least, which is subject to some challenge.

Mr. Agronsky: *A deficiency in judgment?*

Senator McCarthy: *Well, it could be a deficiency in judgment.* Perhaps so. I think there have been many mistakes in judgment with references to Viet Nam. I recall the night before the Khanh government fell we were at a White House briefing, 15 or 20 Senators, and at about nine o'clock we were told there were always qualifications, but that this looked like a pretty stable, acceptable government. Well, the next morning paper had the story it had been overthrown. Well, I expect it was happening about the time, well, we

weren't really being reassured, but the statements were positive. And after an experience or two of this kind I think you inevitably begin to raise some questions and have some doubts.

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May 8, 1966: Arthur M. Schlesinger, Jr.

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Mr. Wallace: *You are quoted by the New York Times as having said recently in a radio interview down at Princeton University that you find Lyndon Johnson "gullible on Vietnam."* I wonder if you would elaborate.

Mr. Schlesinger: *Yes, that remark was made in reference to the Honolulu Conference.*

Mr. Agronsky: The connection with Ky, the relationship to the Ky Government.

Mr. Schlesinger: The relationship to the Ky Government, because it seems to me that any President of the United States who passively accepts information he gets from the Department of State and from the Military on Vietnam, and supposes that it is true on the basis of the experience of several years of showing how mixed and erroneous this information sometimes is, is making a mistake. Why the Department of State could ever have told President Johnson that General Ky was so popular in South Vietnam that he should tie his personal prestige to the Ky regime, this in view of the mortality rate of every government in Saigon for the past three years, seems to me inconceivable. *And the adjective "gullible" simply means to the continued passive acceptance of judgments from people who have been proven so wrong, so consistently wrong in the past.*

* * *

May 15, 1966: Barry Goldwater

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Mr. Pierpoint: *Senator, do you favor doing something about the Vietniks, the anti-Vietnam demonstrators and the draft-card burners;* and if so, what?

Mr. Goldwater: Oh, we have had those fellows with us as long as I can remember and you are going to have them in every conflict we run into. *I can remember as a boy before World War I we had them. The only difference was I think they were a little cleaner looking. They had better haircuts and didn't use four-letter words.* But they objected to war and we have many people who honestly in their hearts in this country object to war, and we provide for these people. They are conscientious objectors, they don't have to go to war. So this is nothing new and I don't think there is anything you can do about it.

Now when we find professors engaging in the fields of tyranny, in my opinion, now I think the law is very clear. We can use the law. But we haven't done——

Mr. Steel: What law affects professors, sir, I don't understand——.

Mr. Goldwater: Well, any man. *I just pulled professors out of a hat because I think of the one from one of the eastern schools that went to Vietnam and was making statements that he hoped that the Viet Cong would beat the United States. This, in my opinion, is treason, pure and simple,* and we have laws that prohibit that and control it. . . .

* * *

June 12, 1966: Governor George W. Romney

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Mr. Benton: *Well, Mr. Reagan has not gone as far as you have gone in condemning the Birch Society,* for

example, which was another strong issue of yours at the '64 convention. But to bring the question down to this, do you think you could support Mr. Reagan's candidacy? Would he make a better Governor for California than Governor Brown? Would you like to see Mr. Reagan elected?

Governor Romney: I have indicated to Mr. Reagan that I would like to see him elected and I think his election would be a strengthening thing for the Republican Party. Now, my understanding is that Mr. Reagan has not solicited the support of what you might call *the extreme right-wing group, the Birch group.* He hasn't repudiated their support but he hasn't sought it.

Mr. Agronsky: Well, would you repudiate it?

Governor Romney: Yes.

Mr. Agronsky: Why shouldn't he?

Governor Romney: Well, I don't think that everybody in the Republican Party has to be marching down precisely the same road on anything—everything. Now, if he was encouraging *the fanatic right-wing group,* that would be one thing. I have no information to indicate that he is doing that.

* * *

Mr. Agronsky: *Governor, the Senate Minority Leader, Everett Dirksen of Illinois, has criticized the Johnson administration on Vietnamese policy on the grounds that the adminstration has been guilty of a lack of candor in reporting the position of our government to the American people. Would you agree?*

Governor Romney: *Yes, I think there is a gap in credibility.* As a matter of fact this gap has been a serious problem. It was a serious problem in connection with convincing nations that we were really willing to negotiate on a

sound basis and I think it is still a real problem. I think there is a lack of confidence in the statements of the people responsible for keeping the American people fully informed.

Mr. Agronsky: *Credibility is a polite way of saying that the administration is not telling the truth to the American people.*

Governor Romney: *Well, it might be the withholding of certain information or other things other than just deliberate misrepresentation. I don't think this involves necessarily deliberate misrepresentation. But for instance I think the American people were quite shocked after what was said about there having been no reason to believe that Hanoi would engage in negotiations of any kind—to learn that Hanoi had actually made proposals back in the fall of 1964 for discussions and the fact that such proposals had been made was not disclosed until it was disclosed in an unusual way. It wasn't disclosed by those responsible and those who should have disclosed it.*

Mr. Benton: Do you think more could be done in that respect?

Governor Romney: *Well, I think that there has been a gradual deterioration in a feeling of confidence about what our government says in this respect. After all, there has been the Sylvester statements, there have been instances where a lack of information was made available.* There have been statements in the newspapers that figure on fatalities and so on were not—casualties were not completely accurate. And these many things have tended to create a lack of confidence.

And I think also the overly optimistic predictions as to the course of events in South Vietnam has created a lack of confidence.

* * *

June 19, 1966: Stokely Carmichael

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Mr. Agronsky: Mr. Carmichael, you say that you would achieve black power by using the franchise, by using the vote. Yet you have also said that your organization in Lowndes County, while out to take power legally, if it were stopped by the government from doing it legally—and I quote your words now—"we are going to take it the way everyone else took it, including the way Americans took it in the American Revolution." This would seem to imply that you are advocating taking power by force and violence by the over-throw, in effect, of the government. Is that what you meant?

Mr. Carmichael: Let me say this: *In Lowndes County that county is 80 per cent black and 20 per cent white. It has been ruled by that minority by force, by violence and by every illegal trick that one can think of. Now the black people in Lowndes County have organized themselves around the question and around the issue that they have been oppressed, which is their blackness. They have been oppressed because they are black.* And, like any other group in the country, they have organized around the issue of oppression. The unions, the workers organize around the question of low wages. And they are going to try to achieve taking over the power structure according to the democratic processes in this country. Now, if no one is willing to assure the fact that that process is carried on, then that leaves the black people of Lowndes County, it seems to me, no alternative except to stay in the condition in which they have been for the last hundred years.

* * *

Mr. Doyle: . . . . Last Thursday you witnessed people registering to vote in Greenwood, Mississippi in the county

court house. That night you told a rally of young people *"every court house in Mississippi should be burned down tomorrow so we can get rid of the dirt."* My question is how do statements like this—and you have made many of them—which incite both your friends and your enemies, how do they advance the cause of Negro equality?

Mr. Carmichael: Well, number one, the cause of black equality will be decided by the black people because they are the oppressed. That is what we have to understand. *And it is a reality that all the court houses in Mississippi are full of filth and dirt, that there is no such thing as justice in any of those court houses for black people, and the history of Mississippi speaks for itself. The history of the murders, from Emmett Till all the way down to the shooting of Mr. Meredith just two weeks ago speaks to Mississippi.*

Mr. Doyle: Can you register voters if you burn down court houses and are you going to burn down court houses——

Mr. Carmichael: I was talking about a literal translation that—I wasn't talking about figuratively, I was talking about literally getting rid of the people inside those court houses, *getting rid of the Raineys and the Prices who are still sheriffs.*

* * *

Mr. Hart: Mr. Carmichael, if you are after economic power, how is the Negro in the delta of Mississippi who is lucky to make $500 a year, what kind of handle does he have on any kind of economic power?

Mr. Carmichael: He doesn't. That is why he has to grab——

Mr. Agronsky: How do you propose to give it to him?

Mr. Carmichael: I don't. I say that he first grasps the political power that is now available to him. You grasp

what you can. He now has at his disposal via the voting rights bill, political power. He grasps that political power and then he starts through that seeing what terms he can use. He controls the C. A. P. Board (phonetic) if he has the political power so that *the Chief of Police of Indianola —who was the Chief of Police last year that beat up black people—who is now the C. A. P. director in Sunflower County, Mississippi*—will not have that power. That Eastland does not have the power and cannot say the things he says. For example, he said on April 22nd, and I quote: "I have objected to the sending of every federal registrar into Mississippi. Ordinarily the Justice Department will inform me the day it plans to send a registrar into a Mississippi county and I have been able to block some." . . . .

* * *

Mr. Hart: Mr. Carmichael, you had a chance to sit down with President Johnson at the White House Conference. Why didn't you?

Mr. Carmichael: We outlined that very clearly. Number one, we felt that the problems of racism in this country does not exist in the black community, it exists in the white community, and that we didn't see why we needed a conference to talk about fulfilling our rights.

Mr. Agronsky: Why not take that opportunity to tell the President?

Mr. Carmichael: We have other reasons. Number two, *we felt that the President was calling that conference at a time when his international prestige in this country was at a low ebb and he was going to use us to try and build up his prestige* and we refused to be a part of that.

Number three——

Mr. Agronsky: *And you thought the whole approach was phony, was that it?*

Mr. Carmichael: *That is correct.*

Number three, he was using—he is at this time carrying on a war in Vietnam which flagrantly violates the life of colored people. It is foolish for us to sit down and talk about human rights.

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July 10, 1966: Senator Jacob K. Javits

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Mr. Agronsky: Senator Javits, a man in political life is often faced with some hard questions. That is kind of an apologia for a very harsh evaluation that has been made of you that I want to quote to you and would like to have your response on. *It is in connection with General Julius Klein and the Senate Ethics Committee investigation of Senator Dodd, who, as you know, through his letters, through the interchange of correspondence with Senator Dodd brought Dodd eventually before the Senate Ethics Committee.*

Now, the columnist, Drew Pearson, on June 16, remarked of your own support of General Julius Klein in a letter to General Klein that you are "either politically stupid or else inextricably beholden to General Julius Klein". Would you like to respond to both of those observations.

Senator Javits: *Well, fortunately that is only Drew Pearson's opinion and he has been proved wrong many times before....*

* * *

August 21, 1966: Pierre Salinger

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....I do feel that we did make serious public information errors during the war in Veitnam during the time that I was Press Secretary to the President in not being more candid about our involvement in that war. And I think those errors have paid off poorly for us in the years that followed.

Mr. Strawser: You don't think public relations really ruled, then, in the making of Vietnam policy?

Mr. Salinger: No, I don't think public relations did rule. I think there was some very solid policy considerations for what went on. But, as I say in the book, I think they were a mistake.

* * *

Mr. Kalb: Yes, but your book takes a somewhat different position vis-a-vis the President's attitude toward Secretary Rusk than Schlesinger's book. You were both very intimately involved in the whole thing. How come there could be such a disparity of views?

Mr. Salinger: Well, Mr. Kalb, all I can say is that I am writing from the standpoint of what I knew as an individual. *I am not writing on the basis of hearsay or try to report meetings where I was not present.* And in the times that I talked to President Kennedy—and I saw him four, five, and six times a day—I never heard him discuss nor did he ever mention to me the possibility that he was thinking of replacing Secretary Rusk after the first term. And that is all I can report.

Mr. Kalb: *Are you suggesting that a historian like Arthur Schlesinger would be reporting hearsay, is that*——

Mr. Salinger: Well, let's not involve Mr. Schlesinger in this for a minute . . . .

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Mr. Kalb: Why do you think that *there is such an enormous, again, credibility gap on the Warren Commission Report?* It is true that all over the world you have this and there are many people who are exposed to American society who know the way America ticks——

* * *

October 9, 1966: Senator John Stennis

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Mr. Shaffer: Well, Senator, one of those who is responsible for the guidelines is the Commissioner of Education, Harold Howe. And, you know, *one of your prominent southern colleagues in the House called him a misfit, an idiot, ignorant, said he talks like a Communist and he said he should be dismissed.*

Senator Stennis: Well, I don't agree. I don't make such attacks as that. I do not agree with it, those descriptions. *But I do say that Mr. Howe is a zealot to a degree.* And, I tell you frankly, I think his instructions come from the White House. I think he has been told to make a showing on this thing, regardless, make a showing percentage-wise, and hurry it up, get the job along—and he is acting under those kind of instructions.

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November 20, 1966: Floyd B. McKissick

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Mr. McKissick: . . . . But one of the salient factors which stands out to my mind is the fact that there is sufficient racism in this country, north, south, east and west, there are sufficient people with prejudice, and this prejudice can be used by any political party or candidate. And that was shown in the New York election, for example, where the Civilian Review Board was defeated, primarily because of *racist advertising showing a white woman walking down the street without police protection, and this type of thing, creating the innuendo that a great big black man was going to grab her and the police would not be free.*

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December 11, 1966: Governor Robert E. Smylie and Governor John A. Love

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Mr. Wallace: Governor Smylie, Robert Welch, the head of the Birch Society, said just within the past week that your defeat in the Republican Primary in Idaho, and also Ronald Reagan's win in California, are largely the result of the efforts of the Birch Society. Do you agree?

Governor Smylie: *Well, I think that this probably is another straw of evidence, the absolute lack of credibility of Mr. Welch and his public relations expert, Mr. Rousselot who I think said the same thing. I know that the Birch Society was active against me in Idaho simply because I don't think that secret societies have got any place in the American political system if it is going to be a free political system. And I have said this time and again. I firmly and sincerely believe it.* I will continue to believe it and I will continue to say it. And if they continue to oppose me, why, I will have to bear this burden. But don't think they were decisive.

Mr. Wallace: In California?

Governor Smylie: I don't think so there, either. I just don't think that this thing reaches that proportion. *It is a dangerous thing because it is well funded, secret in nature, conspiratorial in its activities, and, for that reason, outside the mainstream of American political life.*

* * *

January 8, 1967: Dr. James L. Goddard (Commissioner of FDA)

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Mr. Agronsky: And it moves us very directly to the whole question of false or misleading advertising.

Dr. Goddard: Yes.

Mr. Mintz: I would like to ask a question about that. *The Journal of the American Medical Association assures its readers, "Every statement", in its drug advertisements must be backed up "by substantiated facts or we won't run it."*

You have said that a misleading ad to a physician can be construed to be a clear and present danger to the patient. Your agency has now started civil actions charging false or misleading advertising of three prescription drugs. All of these ads were in the Journal of the AMA. Your agency also has four criminal proceedings instituted, one of them for false drug advertising. Two of these cases, two out of four, involved the Journal, and I ask why is it that the American Medical Association seems to be turning up so frequently as a sponsor of false advertising for prescription drugs, to its own members, I might add?

Dr. Goddard: I don't believe that one could characterize the AMA as being a sponsor of these ads. The evaluation of drug advertising is a very difficult matter. We find with our very small staff of four people involved in this that the detailed evaluation will take as much as ten man days for one ad.

Now, I don't see how any journal, and there are indeed many medical journals that accept advertising, can in effect go into the depths of review that is required to assure the readership that every claim made is indeed accurate and fairly presented.

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January 29, 1967: Senator George Murphy

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Mr. Agronsky: .... But in any case, what the Academic Senate said was that *the dismissal of Kerr was reckless and precipitate and said—I quote it now—"It constitutes*

destructive political intervention in the affairs of the University".

It then goes on to say——

Senator Murphy: This may be possible. I would not presume to question their point of view. But the politics on the Board of Regents—if you will go back carefully, you will find that most of the political appointees on there were appointed by Governor Brown. Actually Reagan only has his own vote, and Bob Finch, who came in as Lieutenant Governor, and one other.

Now, the Board of Directors was made up of people appointed by Governor Brown.

So if there has been politics in it, it certainly would not have been of Reagan's doing. It would have been a result of the Democratic administration preceding him.

Mr. Agronsky: *But could we get your opinion as to whether or not this was a destructive political intervention in the affairs of the University, as the Senate contends.*

Senator Murphy: No, I don't—well, let me just speak now as an ordinary taxpayer in California.

There has been trouble in the University for some time. The University has been upset. The curriculum has been upset. Many of the classes have been upset. *People from off the campus have been coming there, trouble-makers. And many of them you and I have known over the years. And we know their purposes. We know that they are more interested in stirring up some sort of a revolution more for the sake of having a revolution.*

Now we decide—is this good for the University or bad. I personally think it is bad. And I think that Chancellor Kerr, or President Kerr should have done something about it to preserve—it is like the conditions here in Washington. We talk about the danger in the streets at night in our big cities, in New York. I think now it is the duty of gov-

ernment to protect the good, law-abiding, decent citizen, just as it is the duty of the head of the University to keep law and order going there so that the good, hard-working student can go about his business of getting an education.

* * *

I don't think—this University has been in the print now for the last two-and-a-half, three years, because of these turbulent troubles up there. *And while there are great stories about one young man, Mario Savio, as to whether he should be readmitted or not—I think this whole thing was a little ridiculous, if you will forgive me. I don't think he went there for the purpose of education. I think he went there for the purpose of stirring up more trouble. And I think it is time somebody said so clearly and concisely, so there can be no misunderstanding.*

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February 5, 1967: Dr. Clark Kerr

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Mr. Agronsky: *Now the political aspect, you make it very clear that the moment Governor Reagan was elected, you had had it.*

Dr. Kerr: Yes. I came very close to having had it at that point. Yes.

Mr. Agronsky: Then you feel then your dismissal was political?

Dr. Kerr: *Well, as I said before there is more to it than that, but essentially it is political.*

* * *

Mr. Agronsky: Dr. Kerr, you were constantly criticized by Governor Reagan throughout his campaign and there was an enormous amount of talk about this all over the country, that *at the University at Berkeley the students had*

abused freedom of speech, that it was license rather than freedom that had been allowed to them, that they had really gone too far and that they should—you should have been more rigid in controlling demonstrations and in permitting them access to the campus and all the things that went on over those years. Do you feel, looking back now, that you were too lax?

Dr. Kerr: No, I don't. I don't really think so, by and large. Remember, to begin with, that there are nine campuses at the University of California and that I was President of the whole University; that there has always been a Chancellor at Berkeley with a major concern for the campus. *There were excesses by the students at Berkeley* and I greatly regret them. *I think the problem at Berkeley was more that there was too heavy a hand than that there was too light a hand. I think the Chancellor at Berkeley in October of 1964 moved too quickly in bringing in the massive police force. . . .*

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February 12, 1967: Representative George Mahon

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Mr. Agronsky: Mr. Chairman, how do you feel about it yourself? *Many supporters of the President feel that this book deliberately denigrates the President and his family in the way it reports on matters that occurred immediately after the assassination. Would you agree with that? Do you think that the book is unfair to the Johnson family?*

Mr. Mahon: *Well, yes, I think it is unfair and I think it is inaccurate,* but I don't think it has done the President any injury because I think the American people are fair-minded and they have resented some of these implications and so forth.

Mr. MacNeil: What inaccuracies have you found in the book, sir?

Mr. Mahon: Well, I was just noticing one in the picture the other day where it was said none of the President's assistants were present at the swearing in, and here was O'Donnell in a wide angle film picture that was shown in the paper. I mean, I haven't read all of the book. There are so many more important things happening in the world that this emotional thing doesn't appeal to me a great deal. I have read some of the press reports about it but we have got more important business to do like trying to determine what to do about the $158 billion that the President has requested we appropriate at this session of Congress.

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February 26, 1967: Barry Goldwater

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Mr. Pierpoint: Senator, Defense Secretary McNamara said recently, and I quote him here—"I don't believe the bombing has significantly reduced or would significantly reduce the actual flow of men and material to the south". Do you agree with that statement?

Senator Goldwater: I would agree as far as the men, the infiltration. The infiltration increased I think by about 12,000 men last year. That is difficult to stop in those jungles. It is almost impossible. But material—if we destroy the material at the point of its landing, where it is stored, then there is nothing to transport. And I would disagree most violently with the Secretary's suggestion that it hasn't done any good. He said it was doing good just a few months ago. *That's Old Yo-yo—you never know what he is going to say.*

* * *

March 5, 1967: Senator Mike Mansfield

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Mr. White: Well, I thought perhaps you might be interested in another question which has been recently involved a lot, and *that is the matter of the CIA and the so-called subsidy-of-the-students movement which, as I understand it, meant in effect that CIA money was used to finance American students to go to foreign student convocations* which we felt and which experience had rather shown would otherwise have been entirely packed by Communists. *Now, at the time this was first published, first brought to notice, you were quoted as expressing some anxiety about Big Brotherism——*

Senator Mansfield: *That is correct.*

* * *

Mr. Agronsky: *Do you feel the CIA was operating outside the area of its competence and jurisdiction?*

Senator Mansfield: *I certainly do.*

Mr. Schoumacher: *But this is a criticism apparently not leveled at the CIA. You are leveling this at the Administration which must have ordered it to get into this.*

Senator Mansfield: *The question was raised relative to the CIA. I am answering it relative to the CIA and as far as the President is concerned, if that is what you are driving at, I am sure the President had an overall idea what was going on but perhaps, and very likely, he didn't have an idea that this particular series of incidents was going on.*

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Mr. Agronsky: . . . . *Governor Romney of Michigan has contended that the policy of President Johnson in Vietnam is governed by political expediency.* How would you respond to that.

Senator Mansfield: *I wouldn't agree with Governor Romney. I wish he would be a little more specific and explicit in where he stands. He is going all over the rainbow and nobody knows where the Governor of Michigan stands.* If he is going to be a Presidential candidate, he will have to take a stand sometime, some way.

* * *

March 12, 1967: Attorney General Ramsey Clark

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Mr. Agronsky: *Mr. Attorney General, one of the first arrests that has been made by the District Attorney of New Orleans, Mr. Garrison, is of a gentleman called Clay Shaw, which the Attorney General says is an alias for a man named Clay Bertrand, who is mentioned in the Warren Report.*

One of your first statements, when you became Attorney General, was that the FBI had already investigated and had cleared Clay Shaw of any part in the assassination of President Kennedy; yet, Shaw's name is never mentioned anywhere in the Warren Commission report.

Why is that, and is there an identity between Shaw and Bertrand?

Attorney General Clark: Under the circumstances, that is, in view of the fact that there will be a hearing in New Orleans Tuesday, I really think it would be inappropriate for me to comment on the case. *Mr. Garrison has not offered us any evidence that he may have. I am unable to say why he hasn't done this. It would seem to me the natural thing for any prosecutor to do.* But, as of this time, and without real doubt, I would stand by Mr. Hoover's remarks in November of 1966, that not one shred of evi-

dence links any other conspirator to Oswald in the assassination of President John F. Kennedy.

* * *

Mr. Agronsky: *Don't you find it curious, sir, that the District Attorney of New Orleans, having all of the evidence that is at your disposal persists in this investigation and indicates that he has new evidence which he has not turned over to the Federal Government or to you as you requested?*

Attorney General Clark: *Yes, I find it curious and I find it disturbing and I find it saddening.*

* * *

Mr. Agronsky: Mr. Attorney General, to lead you to another area, an area I know that concerns you very much too, the area of wire tapping and electronic eavesdropping, from your knowledge of the Justice Department operations, and you have been in the Department for six years, I believe, *would you say that the blame for wire tapping when Robert Kennedy was Attorney General should be allocated to Mr. Kennedy, or, as Mr. Kennedy has said, should be laid at the door really, of the FBI Director, J. Edgar Hoover?*

Attorney General Clark: Well, I am not in the business of blaming anybody. I am happy to say that I was in the Lands Division for four years, the first four years of my service to the Department of Justice, and we have yet to find any wire tapping in any Lands Division case. I don't think any will be revealed.

* * *

March 19, 1967: Senator J. William Fulbright

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Senator Fulbright: . . . Here at home it seems to me that they are doing a number of things that are very disturbing

to me, not that we are not the richest and most powerful country, economically and militarily; but within the last few weeks and months we have had very disturbing developments in the House of Representatives and the Senate, indicating something is amiss, I think, in our attitude of our people and what is going on in the basic institutions of our society. *And then the CIA revelations which were a great shock to me have also indicated what I believe to be a sickness in our society.* The acceptance of those revelations is very shocking, in my opinion, because *it indicates a departure from what I thought was our traditional democratic system and a confusion of ends and means which to me is very disturbing.* Another small thing is the tendency of the Executive to take the Congress for granted and to downgrade its significance in our system of government. All of this disturbs me, that fundamentally there is something wrong with our present society.

* * *

Mr. Morton: *Senator, you obviously feel that the administration is guilty of not telling very much about this whole area.*

Senator Fulbright: *I didn't know I was alone in that thought. I thought that this was sort of held in general.*

* * *

Mr. Marder: *You started out by saying, sir, that the CIA revelation was a great shock to you.*

Senator Fulbright: *It was a great shock to me.*

Mr. Marder: Have you not held some hearings or a hearing in private and what are your intentions so far as your committee is concerned about—

Senator Fulbright: Well, it isn't my committee. I have just been invited on two occasions to participate in the committee which is controlled by the members of the Ap-

propriations and Armed Services Committees. You know who they are. I don't want to take the time to recall them. But I didn't learn very much more there than was revealed in the Washington Post article by Mr. Harwood. What shocks me is not that the CIA itself is doing it. I don't blame the CIA. It is the attitude of mind in this country that accepts this kind of activity without being concerned about it. *I think this is very, very subversive of our democratic concepts of society. This was what I meant when I said confusing the means and the ends. We are approaching, it seems to me, the same kind of ideas here and practices which we greatly object to in the Communist system.*

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April 9, 1967: Senator Thruston B. Morton

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Mr. Kenworthy: *Senator, yesterday Bobby Baker, the former Secretary of the Democratic Majority, was sentenced for from one to three years. You also have the situation now of the Ethics Committee, in the stipulation, has agreed with Senator Dodd that the Senator from Connecticut has used campaign funds for personal expenditures. You have the Powell case on the House side.* Your colleague from Kentucky, Senator Cooper, was instrumental in setting up the Ethics Committee. What are your views on what should be done and are the Republicans going to have a party position on this question? *There is a growing cynicism in the country about the Congress.*

* * *

Senator Morton: Well, I think—the Dodd case and the Powell case are quite different and I don't think—I think in the minds of the public they are probably associated as one and the same thing. I think in the case of Senator

Dodd, from what I have read and from the hearings that have been public here, *his problem seems to be more the Internal Revenue Service at this point, that he does have a problem there.*

* * *

Mr. Kenworthy: *Senator, you mentioned the problem that he may have with the Internal Revenue Service on using campaign money for personal expenditures. Might he not also have a problem with the State of Connecticut because their Corrupt Practices Act up there has very strict limitation on how money can be used?*

Senator Morton: *Yes, he would have a problem there.*

* * *

Mr. Mac Neil: Do you think there has been enough exposure of anything like this? *I mean you are suggesting that the Senator has had a criminal violation here in the Internal Revenue field.*

Senator Morton: Well, I—

Mr. MacNeil: Can the Senate just ignore that?

Senator Morton: *No, I don't think we can ignore that at all.*

* * *

April 16, 1967: Dr. Martin Luther King, Jr.

* * *

Mr. Poston: Dr. King, as foremost advocate of non-violence and of inter-racial cooperation in this field, *how did it feel to be sharing the platform with the prophet of Black Power, who not only urges racial violence, who not only urges self-segregation for Negroes, but who calls your President and my President a buffoon, and the Secretary of State a fool, and the Secretary of Defense, who has done more to bring about integration of the Army, a racist.*

Dr. King: Well, I certainly would not say these things myself. I have been on the platform with many people—even members of my own staff—who would say things that I would not say.

It is very difficult, as you know, to get a unanimity of opinion on any issue. And I would not go that far. I would never call the President a fool or whatever he was called, or the Secretary of State a fool, or Mr. McNamara a racist. I do not happen to feel that Mr. McNamara is a racist . . .

* * *

Mr. Poston: There are many who claim that the Vietnam war has contributed less to the crippling of the civil rights movement than the development of the white backlash, than the demonstrations and the riots that occurred in Chicago and Atlanta. And so therefore we have lost support of one of our strongest civil rights advocates, Senator Douglas. We have brought about the defeat—we have brought about the election of *a segregationist Governor in Georgia.* And we did not get accomplished, as I think you urged, the defeat of Mayor Daley in Chicago.

* * *

Mr. Agronsky: Dr. King, we have very little time left. *I wonder if you can tell me if you regard racism as behind the manner in which the House of Representatives treated Adam Clayton Powell.*

Dr. King: *I certainly do.* This is very obvious to me, and many other persons in the Negro community.

The fact that Congress had not set up a uniform code of conduct applicable to all Congressmen when it dealt with Congressman Powell; the fact that the Senate, the other part of the Congress, will not unseat Mr. Dodd, and will certainly not take him from his committees, tells me that we are dealing here with race and racial overtones.

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April 30, 1967: Edward Bennett Williams

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Mr. Williams: Yes, I will start with wiretapping. I am against lawless law enforcement. Wiretapping and eavesdropping are lawless law enforcement. That is what we are talking about tomorrow—Law Day. The theme is nobody is above the law; nobody is beneath it. I don't think there is any law enforcement agency in the United States that is above the law. I don't think that anybody can break the law in order to enforce it.

Mr. Agronsky: *What agencies do you have in mind that are breaking the law?*

Mr. Williams: *Well, we have had wholesale disclosures, Mr. Agronsky, in the past year of microphone surveillances that have been conducted by the Federal Bureau of Investigation from* 1961 *to* 1965. *Senator Long's committee has exposed violations of the right of privacy by Internal Revenue agents.* I think that the President is very sensitive to this problem. In his State of the Union Message and again in his Crime Message to the Congress, he called for strong legislation, unambiguously and unqualifiedly outlawing wiretapping, making it punishable by five years in prison, and unambiguously and unqualifiedly outlawing eavesdropping and making it punishable by five years in prison.

Mr. Agronsky: Certainly the federal agencies that engage in these things are not liable to five years imprisonment or—

Mr. Williams: The right of privacy bill which is now pending in the Senate is hopefully going to be enacted and it will correct any ambiguities that exist now with respect to the law. But I think it is quite clear, Mr. Agronsky, that *what those agencies have done in the past four years have contravened both the federal statutes, state statutes and the Constitution of the United States.* And I think that

perhaps they should give an accounting of this stewardship to the Long committee. Senator Long is holding hearings now on the Right of Privacy Act which was submitted by Attorney General Clark. And I think incident to consideration of that bill that there should be testimony taken as to just how far, how widespread the invasion of the right of privacy of American citizens has gone in the past four years.

Mr. Agronsky: Would you call J. Edgar Hoover to account before this committee? Should he be?

Mr. Williams: *I think that either he or some other high-ranking official in the Federal Bureau of Investigation who knows the facts should give a full explanation of the conduct of the agents in the past four years. They admittedly used hidden microphones and hidden transmitters in hotels, in offices, in private homes, in apartment houses to listen to conversations of citizens some of whom weren't suspected of any crime.* And these microphones and these transmitters were monitored on a 24-hour basis. Thousands of man-hours were deployed to this form of electronic surveillance. Hundreds of thousands of dollars were spent. When the thing was unearthed the President deplored it. Attorney General Clark has deplored it. Remedial legislation is now pending and I think that in order for the Congress to enact intelligently legislation in this area it should have the benefit of full information on the subject. It has not yet had full information on the subject.

Mr. Agronsky: *Do you think the FBI has abused this power?*

Mr. Williams: *Abused the power of—*

Mr. Agronsky: *Of wiretapping?*

Mr. Williams: *I believe it has abused the power. I believe that the revelations of what was done between* 1961 *and* 1965 *shows a wholesale invasion into the right of pri-*

vacy of the American citizens. It shows a violation of the Fourth Amendment. I believe that it shows violations of state statutes. We know, they admitted that they violated the Nevada State statute on eavesdropping, a criminal statute. And we know now that this has been done in Miami, in Washington, in New York, in Kansas City, in Chicago, in Los Angeles, and in many, many other large metropolitan areas in the United States.

* * *

May 14, 1967: Senator Russell B. Long

* * *

Mr. Agronsky: Senator, there's another case in which you're very much interested in that also concerns a former FBI agent, your colleague, Senator Dodd. Have you been able to win any support to stand with you against the censure of Senator Dodd, as the majority of your colleagues have—

Senator Long: I don't know what other Senators are going to do about that, Mr. Agronsky. I am convinced of a number of things. One, that Tom Dodd violated no law. He violated no rule of the Senate. What he did is a kind of thing that has happened many times before. He is guilty in my judgment only of being poor to the extent that he had to call upon his neighbors and his friends for financial assistance both to be elected to the office and to pay the expenses of being a Senator the way he thought that he should try to conduct himself as a Senator. In addition to that, he is guilty of hiring *some treacherous employees who went through his files by night and took out four thousand letters and documents that they thought could be used by scandal columnists to embarrass him. They didn't turn those letters over to the police. They turned them over to some sensation-seeking columnists,*

and those people wrote columns putting those things in the worst possible light.

* * *

May 21, 1967: Senator Thomas J. Dodd

* * *

Mr. Mudd: *Well, I thought your main blame was directed at Mr. O'Hare for his sloppy bookkeeping in Washington, but I wasn't aware that Mr. Sullivan was culpable—*

Senator Dodd: *I didn't say Mr. Sullivan was in the same category with Mr. O'Hare.* Sullivan got the bills that were sent up principally from Washington. He wouldn't know whether this bill was a campaign bill or not. And because the funds were mingled and not segregated they were paid out . . .

* * *

Mr. Bell: *Senator, there is a story in the morning paper about one of your colleagues, Senator Long of Missouri, who received* $48,000, *according to this story, over a course of many months for referring law cases to a certain St. Louis law firm.* Have you done any of that, referring cases to certain lawyers? And do you think this is ethical for a United States Senator to do?

* * *

May 28, 1967: Senators John Sherman Cooper and George S. McGovern

* * *

Mr. Lisagor: . . . . You have said in that notable speech that you made—the New York Times called it a notable speech—on Vietnam, that *the Administration is "faced with a credibility gap as wide as the Grand Canyon."* Un-

der those circumstances, could you run as a kind of ballot-mate of President Johnson's?

* * *

July 9, 1967: Whitney M. Young, Jr.

Mr. Young: I did not mean to suggest that there was going to be an adherence to President Johnson. I think a lot depends on who the candidates are, who the Republicans will put up to run, whether they will run Ronald Reagan or whether they will run Mr. Nixon or whether they will run Governor Rockefeller. And a lot depends on the platforms and the climate and the mood that comes out of the conventions. *If we have a repeat of the 1964 conventions, where there was obviously an anti-Negro feeling and a subtle racism—talk about crime in the streets and "your home is your castle"*—and if there is an election of a candidate who either overtly or covertly is appealing to the so-called back-lash vote of the country, and President Johnson is the Democratic nominee, then obviously he will get it.

* * *

July 23, 1967: Governor Richard J. Hughes

* * *

Mr. Hardy: *Governor, what of the charges of police brutality in both instances, in Newark and Plainfield, the direct cause, the spark that started things more or less could be laid to a charge of police brutality? And this was also one of the chief grievances of the group of people in Plainfield that rioted, more or less.*

Governor Hughes: I don't know. Police brutality, yes. I don't pretend that all policemen are perfect but I tell you that if this country is swayed aside into a general loss of

confidence in police and law and order we have got to begin to think about what we are going to do to replace the police.

* * *

Mr. Agronsky: Well, Governor, let's return to Mr. Dean's point that you knew about these things and that nothing happened. Here you made an application for participation in a federal program—or the City of Newark did, and this is well known now—that begins with a statement that among major American cities Newark and its citizens face the highest percentage of substandard housing, the most crime per hundred-thousand of population, the heaviest per-capita tax burden, the sharpest shifts in population, the highest rate of venereal disease and the highest rate of new cases of tuberculosis and maternal mortality. This was before the riots began. They worked on this for a year or two. *You knew that all these things things happened. The Mayor of Newark knew that all these things were happening.*

Governor Hughes: Well, if you are implying any guilt of inattention to it, Martin, no, this country—

* * *

August 6, 1967: Senator Everett Dirksen

Mr. Agronsky: *Senator Dirksen, a recent Republican Party statement read by you blamed President Johnson for the racial riots. Your Republican colleague, Senator Thruston Morton, denounced this as irresponsible.* Do you agree?

Senator Dirksen: Well, I did not fashion that statement. I was a sort of an intermediary who was impressed into service to read that statement. But a committee actually fashioned that statement.

* * *

Mr. Agronsky: Senator Dirksen, though the statement was a Republican Coordinating Committee statement, you did read it, and you still really have not answered me, sir. *Do you agree with Senator Morton's denunciation of it as irresponsible?*

Senator Dirksen: Well, I have not gone as far quite as might be implied by that statement. I like to be rather cautious and careful about any allegations or accusations that I make. And so I think I would be content to let that answer drop just about there.

* * *

Mr. Lisagor: *Your House colleague, Representative Gerald Ford, has said of the Viet Nam war that it has been shockingly mismanaged. He seems to know what is going on there.* Do you agree with that, or don't you?

Senator Dirksen: Well, I hope there is somebody who knows. But I think it would be high pretense on my part if I tried to undertake the role of an expert on Viet Nam. I have to take it for what it is. And I try to be a realist about it. Who do we have the Joint Chiefs? Why do we have the best that the Army could offer by way of a staff under the leadership of General Westmoreland out in Viet Nam? And then of course either ignore or brush aside their demands and their advices?

* * *

Mr. Hart: *That sounds like a repudiation of the statement blaming the President for the riots.*

Senator Dirksen: I didn't blame the President for the riots.

Mr. Hart: The statement you read—

Senator Dirksen: Well, I didn't blame the President for the riots. I made it clear as crystal that I read a statement that was brought about by a committee of three.

Mr. Agronsky: How could you lend yourself to reading it, sir, if you did not agree with it?

Senator Dirksen: Look—you are a party functionary, and when you have maybe forty, fifty people around, and they think you ought to read what was agreed upon by the Coordinating Committee, and unanimously—

Mr. Agronsky: *Senator Morton, who is a former Chairman of the Republican National Committee, a member of your party, denounced it as irresponsible. He would not have read it.*

Senator Dirksen: Who else denounced it as irresponsible? Who else? Now that you bring up an individual—who else?

Mr. Agronsky: No members of the Republican Party did that I am aware of.

* * *

Mr. Lisagor: On this question of intent, Senator, *Governor Romney has said that people like Stokley Carmichael, one of the militant Negro leaders, now in Cuba, ought to be charged with treason.* Do you think that ought to happen?

Senator Dirksen: Well, treason is precisely defined as giving aid and comfort to the enemy. Now you have to prove it. And I would be the last man to ever put the finger of treason on anybody unless there was a pretty clear showing, because that is a terribly sinister charge to make.

Mr. Agronsky: *Does that mean you would not be against the naming of Carmichael as a traitor?*

Senator Dirksen: *Well, if you can establish that fact. . . .*

* * *

August 20, 1967: Sargent Shriver

Mr. Agronsky: *Mr. Shriver, a parade of police and municipal officials have charged that the poverty program*

workers have helped incite riots in this country. What is your answer?

Mr. Shriver: Well, I don't think it is true or accurate. We have about 65,000 persons employed in the twenty-eight cities where there have been disturbances. These are either full-time or part-time employees. Of these 65,000 people who live in the ghettos and work in the ghettos, 13 have been arrested so far. In fact, I think it is a miracle that so few of these people who are right in the ghettos where the riots occur have been involved in any way in the actual riot activity.

* * *

Mr. Agronsky: *To take a specific example, Jesse Gray of Harlem, who led, as you know, two demonstrations here in the House of Representatives, or attempted to lead a second one last week, is a* $50 *a day consultant for the Office of Economic Opportunity.* How do you explain that?

Mr. Shriver: Well, first of all he is not a consultant for the Office of Economic Opportunity.

Mr. Agronsky: For the Harlem Youth Administration, which is funded by the Office of Economic Opportunity.

Mr. Shriver: That's right. And in New York they have the right to employ the people that they wish to have and to fire the people that they wish to fire. *I have spoken on three or four occasions to the officials in New York City reasonible for the New York City antipoverty program and have urged them to strike Mr. Gray off the rolls as a consultant.* They, however, have the right not to do that. And it is their judgment, not mine, their judgment that his participation in this program in New York is valuable to them. One of the things that Americans don't understand about our program well enought is the fact that it is a local program. It is locally managed, locally directed.

The local people hire and fire the local employees. We don't have that authority in Washington. So Mr. Gray is a local employee of a local antipoverty program in New York. He has been employed by local people and he works under the city government of New York.

Mr. Raspberry: Mr. Shriver, you made quite a point in your testimony before the House Education and Labor Committee that only, as you say, 13 *paid poverty workers have been involved with the rioters and in the rioting.* It seems that either they are involved in these disturbances or they are not in touch with the bottom-of-the-barrel poor who are involved. How do you get out of this kind of dilemma?

* * *

September 3, 1967: Senator William Proxmire

Mr. Herman: But [the cost of the Vietnam war] is one of the key figures that you need to understand which way—

Senator Proxmire: We should have that. We ought to have that and we haven't gotten it.

Mr. Herman: Now why haven't you got it? Is it because they have not been able to figure it out or are they withholding it from you?

Senator Proxmire: Well, it is difficult to figure out with precision. But I just can't understand why the administration cannot give us a more accurate picture at the end of August, when Mr. Schultze appeared before our committee, the Director of the Budget, why they can't give us a more accurate figure at the end of August than they could in January. And he couldn't. He didn't give us any updated figure. The best figure we've gotten is from Senator John Stennis, of the Preparedness Subcommittee, who told us that he anticipated an increase of between $4 and $6 billion.

Mr. Herman: Well, have you any idea why they may be unable to give you or unwilling to give you these important figures?

Senator Proxmire: I don't know. I think that some people contend that if they gave us these figures, the arguments against some of the administration's programs might be stronger. But I can't say why they can't give us more accurate figures. But they should.

Mr. Herman: Is it perhaps to keep the tax increase, the surcharge from being labeled the "Vietnam tax"?

Senator Proxmire: No, I think it is being labeled by those who oppose the Vietnam actions a "Vietnam tax" anyway.

Mr. Agronsky: *You said, Senator, that you thought they were withholding information perhaps on the grounds that it might go against some of their other administration proposals.*

Senator Proxmire: *Yes.*

Mr. Agronsky: What do you mean by that?

Senator Proxmire: Well, I said this is the view of some people. It is not my view. I think that some people feel that the administration is very anxious to get their antipoverty program through, their educational programs, programs I suppose and I think are necessary in the national interest, to get those adopted. *And in order to get them adopted they have to fog up situations a little bit as far as other costs are concerned. . . .*

* * *

September 17, 1967: Reverend James E. Groppi

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Mr. Pappas: You said, Father Groppi, that Milwaukee needs good housing. Well, Mayor Maier has offered to

bring in open housing on a county-wide level. Why are you insistent, so insistent upon having it only in Milwaukee?

Father Groppi: First of all because on a county-wide level, for one thing, it would not come until next spring. *This appears to us to be another promise, you see, a means to placate the black community so that we stop our demonstrations. And then when next spring comes we get nothing anyway.* We're interested in anything that will bring about decent housing for black people. *The Mayor has a habit of passing the buck. Here he is passing it to the county. Previously he passed it to the state.* We believe that the city should take the lead in fair housing.

* * *

Mr. Hanley: *—the Archbishop has said that there is no foundation to any charges that the church is tiptoeing in civil rights because it is afraid to offend its more affluent membership. Would you agree with this?*

Father Groppi: *No, I would not agree with this* because I have been in some of the parishes on the South Side. I don't only like to point to the South Side because this is existing consistently throughout the white community. The plight of the black man is not preached. The Gospel of Jesus Christ, for example, when we talk about the Parable of the Good Samaritan, clergymen consider this imprudent to talk about the black man and the injustice that has been exhibited towards the black man in our society. We don't hear sermons on interracial justice.

* * *

Mr. Agronsky: You wouldn't certainly go as far as *Rap Brown and SNCC in promoting violence and calling for violence as a demonstration of the black power——*

Father Groppi: As far as Rap Brown and Stokely Carmichael are concerned—I have said this before and I say it again—I have never sat down and talked to Rap Brown. I have never talked to Stokely Carmichael. And

therefore I do not make judgments as far as to what they are teaching. The only thing I know about Stokely Carmichael and Rap Brown is what I read in the papers and this makes me a little cautious. But objectively as far as what Stokely Carmichael is preaching, and as far as what Rap Brown is preaching, morally I see no problem as far as violence is concerned. There are various moral opinions as far as the use of violence for the attainment of one's rights, for the overthrow of an oppressive government. Tactically and strategically perhaps you could argue this——

* * *

Father Groppi: . . . First—at times, you see, when you look at the demonstrations, for example, in the labor movement, in women struggling for equality. Even with Ghandi's demonstrations in India there were certain times when violence came forth. You can't expect to have a nonviolent movement which completely remains nonviolent. There are times when you are going to have sporadic outbursts of violence, granted. You talk about the Mayor's office but no one talks about the fact that *the police department threw teargas in our Freedom House and burned the place down, held the fire department back so that this fire got a good start.* And we sat there and watched that. No one talks about the fact that they threw teargas in the church and in the convent and in the rectory. No one talks about *the fact of police brutality,* you see. No one talks about the fact that they arrested 58 people, running inside our Freedom House and dragging them out when we had a peaceful assembly on our own property, you see. This is my kind of—when you start talking about saying this is wrong, then I'll say well maybe the young men should not have torn up the Mayor's office. But, you see, *the image of the Mayor of the City of Milwaukee in the black community*

is this, it is an oppressor. We know what he did when that disturbance occurred on Third Street. People called it a riot; we called it a civil disturbance. Some of the Youth Council members called it a social revolution. The Mayor called in the National Guard, put the entire city under a curfew. Now what happened when we tried to exercise our American constitutional right of demonstration and protest in a nonviolent way on the South Side? Well, we nearly got killed down there, and I mean it. They wanted to annihilate us.

Mr. Pappas: But didn't——

Father Groppi: And yet he refused to give us the kind of protection that was necessary. So here were these young men, militant and angry, sitting in his office. They arrested a few of the leaders, you know, and here was this man's office. They got carried away and they tore the place up. $3,000 damage, I would say about that much damage was done to the Freedom House by the police department.

Mr. Pappas: Didn't the teargas come after you tried to march against the Mayor's proclamation?

Father Groppi: No. The teargas——

Mr. Pappas: It was the first time you were arrested, yes.

Father Groppi: No. We had two demonstrations on the South Side. The Mayor, instead of giving us protection to exercise our right of free speech, brought out his proclamation refusing all demonstrations and all peaceful assemblies—I don't know what in the world he called it. It was rather ambiguous. Our lawyers are still looking at it and they claim it is unconstitutional.

Mr. Agronsky: Well, he rescinded it.

Father Groppi: Sure he rescinded it, because I think he knew that it would not hold up in court.

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October 15, 1967: Senator Stuart Symington.

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Mr. Agronsky: Senator, your Chairmanship of the Senate Preparedness Subcommittee is giving you a unique opportunity to see the conflict in the position of the Secretary of Defense, Mr. McNamara, and that of the Joint Chiefs of Staff. There is a fundamental conflict, is there not, on various targets.

Senator Symington: Mr. Agronsky, I am not the Chairman. Senator Stennis is the Chairman. I am the ranking member. Yes, there appears—

Mr. Agronsky: Of the Senate Preparedness Subcommittee.

Senator Symington: Yes. And there is a very basic difference. We knew of that difference, that is why we wanted to have these hearings. *With all due respect to the Secretary, he's a fine American, dedicated and patriotic, but he is not until recent years a military expert.* And it worries me that we have been so ineffective in Vietnam and at the same time that *he has so consistently ignored the recommendations of the best that we've got in the military.*

Mr. Glass: Well, then—

Senator Symington: And this has been brought out by these hearings.

Mr. Glass:—do we need a military expert, then, to take over the Pentagon?

Senator Symington: No, I wouldn't say that. I think civilian control is vital, but I would hope under the next civilian control or future civilian control that we would have more progress in Vietnam. And I am one who believes that if we'd listen just a little bit to the best that we have

in the military, with respect to how to conduct the war, that we would have done better than we've done so far.

Mr. Agronsky: *Do you think that the Secretary of Defense, then, by his position, is hampering the conduct of the war by the United States—*

Senator Symington: I wouldn't want to draw any conclusions of any character. I am very fond of the Secretary of Defense, I think it is most unfortunate—of course he has a right of decision, that's our way of life. We have civilian control of our government. But I do think that these hearings have brought out the depth of the disagreement between the Secretary of Defense and the Joint Chiefs of Staff and all other military commanders. And I think it is unfortunate that the American people at one time felt there was general agreement among the military with the way that this war was being conducted. That is not true, Mr. Agronsky, and I say that based on my four recent trips to Vietnam.

* * *

Mr. Argronsky: *And what Mr. Glass is asking you—and I will put it even more bluntly—do you think that the Secretary of Defense is hampering the war effort and should resign?*

Senator Symington: I would not want to comment on that because as to whether he does or does not resign is up to the President of the United States. And I think he is a fine American. *I would hope, however, in the future that he listens more to the Joint Chiefs of Staff because I do not think that the results of this war, the bonus on this war, you might say, after the last two or three years, is something that would justify our continuing with the present policies that we have.*

III. SELECTED CBS DOCUMENTARIES

CBS News Inquiry, "The Warren Report," June 25-28, 1967

* * *

Cronkite: And that was to be that—an official version of the assassination, arrived at by men of unimpeachable credentials, after what the world was assured was the most searching investigation in history.

Yet in the two and a half years since the Warren Report, a steady and growing stream of books, magazine articles, even plays and a motion picture, have challenged the Commission and its findings; have offered new theories, new assassins, and new reasons.

Only a few weeks ago, a Harris poll revealed that seven out of ten Americans are convinced that there remain many "important unanswered questions," that the whole truth has not been told.

A Gallup poll shows more than six of every ten Americans question that there was a lone assassin.

Man: *Well, I don't think that all the facts were brought out. I think something was held back.*

Woman: I think there were more involved in it than just Oswald.

Woman: *The only thing that disturbs me is the fact that they've sealed away some of the evidence and I think that's rather disturbing to most people.*

Woman: I've read the Warren Report, and as I say, I think those men are men of honesty and integrity. And I think they were asked to do a tremendous job within a very short period of time after the assassination, and I think they did the very best they could.

* * *

Cronkite: *There is an old axiom among lawyers that nothing carries more weight with a jury, or is less reliable, than eyewitness testimony. In this case we have just learned that the testimony of assassination earwitnesses also is unreliable.* In a moment of utter horror and confusion, in a bowl certain to start echoes, it's too much to expect that human ears will register and correctly recall the number and sequence of a series of quick shots.

* * *

Wallace: *One question is asked again and again: Why doesn't Jim Garrison give his information, if it is valid information, why doesn't he give it to the Federal Government? Now that everything is out in the open the C.I.A. could hardly stand in your way again, could they? Why don't you take this information that you have and cooperate with the Federal Government?*

Garrison: *Well, that would be one approach, Mike. Or I could take my files and take them up on the Mississippi River Bridge and throw them in the river. It'd be about the same result.*

Wallace: *You mean, they just don't want any other solution from that in the Warren Report?*

Garrison: *Well, isn't that kind of obvious? Where do you think that pressure's coming from, that prevents witnesses and defendants from being brought back to our state?*

Wallace: *Where is that pressure coming from?*

Garrison: *It's coming from Washington, obviously.*

Wallace: *For what reason?*

Garrison: *Because there are individuals in Washington who do not want the truth about the Kennedy murder to come out.*

Wallace: *Where are those individuals? Are they in the White House? Are they in the C.I.A.? Are they in the F.B.I.? Where are they?*

Garrison: *I think the probability is that you'll find them in the Justice Department and the Central Intelligence Agency.*

Wallace: You're asking a good many questions, but you haven't got the answers to those questions. You have a theory as to why indeed the President might have been assassinated by a group of dissidents. . . .

Garrison: No. Your statement is incorrect. We have more than a theory. We have conversations about the assassination of the President of the United States, and it does not include only the conversation brought out at the preliminary hearings. We have money passed, with regard to the assassination of the President of the United States. We have individuals involved in the planning. And we can make the case completely. I can't make any more comments about the case, except to say anybody that thinks it's just a theory is going to be awfully surprised when it comes to trial.

Wallace: *Garrison says Clay Shaw used the alias Clay Bertrand, or Clem Bertrand. At Shaw's preliminary hearing Perry Russo testified that Shaw used the name Clem Bertrand the night of the alleged meeting to plot the assassituation. It was obviously a crucial point in Garrison's presentation at that hearing.*

But a week ago NBC said it has discovered that Clay Bertrand is not Clay Shaw. NBC said the man who uses that alias is a New Orleans homosexual, whose real name — not disclosed in the broadcast — has been turned over to the Justice Department.

Cronkite: Garrison's problems multiplied yesterday. His chief aide, William Gurvich, who conferred recently with Senator Robert Kennedy, abruptly resigned.

Gurvich was questioned by Bill Reed, News Director of WWL-TV, New Orleans, and CBS News reporter Edward Rabel.

Rabel: Mr. Gurvich, why did you resign as Mr. Garrison's chief aide in this investigation?

Gurvich: I was very dissatisfied with the way the investigation was being conducted, and I saw no reason for the investigation — and decided that if the job of an investigator is to find the truth, then I was to find it. I found it. And this led to my resignation.

Rabel: Well, what then is the truth?

Gurvich: *The truth, as I see it, is that Mr. Shaw should never have been arrested.*

Rabel: Why did you decide to see Senator Robert Kennedy?

Gurvich: Ed, I went to Senator Kennedy because he was a brother of the late President Kennedy, to tell him we could shed no light on the death of his brother, and not to be hoping for such. After I told him that, *he appeared to be rather disgusted to think that someone was exploiting his brother's death, and—by bringing it up, over and over again, and doing what has been done in this investigation.*

Reed: *There's been talk of allegations, of wrong-doing, of coercion, of possible bribery on the part of investigators — of certain investigators for the District Attorney. To your knowledge, are these allegations true?*

Gurvich: *Unquestionably, things have happened in the District Attorney's Office that definitely warrants an investigation by the Parish Grand Jury, as well as the Federal Grand Jury.*

Reed: *Would you say these methods were illegal?*

Gurvich: *I would say very illegal, and unethical.*

Reed: Can you give us any specifics?

Gurvich: I would rather save that for the Grand Juries, Bill, if I may.

Reed: Is this on the part of just one or two investigators, or does it involve the whole staff, or perhaps Mr. Garrison . . .

Gurvich: It involves more than two people.

Reed: *More than two people. Do you believe Mr. Garrison had knowledge of these activities?*

Gurvich: *Yeah—of course, he did. He ordered it.*

Reed: *He ordered it?*

Gurvich: *He ordered it. Yes, sir.*

Rabel: *Why did he feel it was necessary to order such activities?*

Gurvich: *That I cannot explain. I am not a psychiatrist.*

Reed: *Mr. Garrison said the C.I.A. has attempted to block his investigation . . .*

Gurvich: *His purpose for bringing the C.I.A. in, Bill, is this: As he put it, they can't afford to answer. He can say what he damn well pleases about that agency, and they'll never reply.*

* * *

But the whole atmosphere of his investigations, and the charges that have been made by news organizations concerning it, are not such as to inspire confidence. It may be that Garrison will finally show that there was a lunatic fringe in dark and devious conspiracy. But, so far, he has shown us nothing to link the events he alleges to have taken place in New Orleans, and the events we know to have taken place in Dallas.

* * *

Cronkite: *But the most recent, most spectacular development in the Oswald case involves the C.I.A. It involves, too, the spectacular District Attorney of New Orleans, a man they call the Jolly Green Giant.* It involves an arrest, hypnotism, truth serum, bribery charges, and, for the first time, an outline of a conspiracy. It certainly accounts for the recent national upsurge of suspicion concerning the conclusions of the Warren Report. And it raises a new question: Was the assassination plotted in New Orleans?

Mike Wallace reports.

Wallace: New Orleans District Attorney Jim Garrison quietly began his own investigation of the assassination last fall. In a sense, he picked up where the Warren Commission had left off. Warren investigators questioned a number of people in New Orleans after the assassination, and they failed to implicate any of them. But the more Garrison went back over old ground apparently, the more fascinated he became with the possibility that a plot to kill President Kennedy actually began in New Orleans. By the time the story of his investigation broke four months ago he seemed supremely confident that he could make a case, that he had solved the assassination.

Garrison: Because I certainly wouldn't say with confidence that we would make arrests and have convictions afterwards if I did not know that we had solved the assassination of President Kennedy beyond any shadow of a doubt. I can't imagine that people would think that—that I would guess and say something like that rashly. There's no question about it. We know what cities were involved, we know how it was done—in the essential respects. We know the key individuals involved. And we're in the process of developing evidence now. I thought I made that clear days ago.

Wallace: He shocked New Orleans four months ago by arresting the socially prominent Clay Shaw, former director of the New Orleans International Trade Mart.

Garrison's charge was that Shaw had conspired with two other men to plot the assassination of President Kennedy. Garrison said Shaw had known David Ferrie, an eccentric former airline pilot who was found dead a week before Garrison had planned to arrest him. Incidentally, the coroner said Ferrie died of natural causes. But Garrison called it suicide.

He said Shaw also knew Lee Harvey Oswald; that Ferrie, Oswald, and Shaw met one night in the summer of

1963 *and plotted the President's death. Clay Shaw said it was all fantastic.*

Shaw: I am completely innocent of any such charges. I have not conspired with anyone, at any time, or any place, to murder our late and esteemed President John F. Kennedy, or any other individual. I have always had only the highest and utmost respect and admiration for Mr. Kennedy.

The charges filed against me have no foundation in fact, or in law. I have not been apprised of the basis of these fantastic charges, and assume that in due course I will be furnished with this information, and will be afforded an opportunity to prove my innocence.

I did not know Harvey Lee Oswald, nor did I ever see or talk with him, or anyone who knew him at any time in my life.

Wallace: A preliminary hearing for Shaw was held two weeks after his arrest. The hearing was complete with a surprise mystery witness, Perry Raymond Russo, twenty-five-year-old insurance salesman, and friend of the late David Ferrie. Through three days of intense cross-examination *Russo held doggedly to his story, that he himself had been present when Shaw, Ferrie, and Oswald plotted the Kennedy assassination. Russo admitted at the hearing that he had been hypnotized three times by Garrison men.*

A writer for The Saturday Evening Post said he read transcripts of what went on at those sessions. *The writer suggested that Russo's entire performance at the hearing was the product of post-hypnotic suggestion.* Clay Shaw was ordered held for trial. It could be months before the trial actually takes place.

Meanwhile, various news organizations have reported serious charges against Jim Garrison and his staff, alleging bribery, intimidation, and efforts to plant and or manu-

facture evidence against Shaw. Last month Newsweek Magazine said Garrison's office had tried to bribe Alvin Beauboeuf, the twenty-one-year-old former friend of David Ferrie. Beauboeuf, the magazine said, was offered three thousand dollars to supply testimony that would shore up the conspiracy charge against Shaw.

Garrison promptly released an affidavit Beauboeuf had signed. The affidavit said no one working for Garrison had ever asked Beauboeuf to tell anything but the truth.

Subsequently, New Orleans police investigated the Beauboeuf charge and said Garrison's men had been falsely accused. But that was just the beginning. *Three more bribery accusations have since come to light, two involving Louisiana prison inmates, one involving a nightclub and Turkish Bath operator. In each of those cases the charges that rewards were offered in return for allegedly false testimony or other help that would implicate Clay Shaw.* We will hear Garrison's comment on those charges later in the broadcast.

* * *

Garrison has expanded the scope of his charges to include not only a Shaw-Oswald-Ruby link, but the C.I.A. as well. Further, Garrison says he knows that five anti-Castro Cuban guerrillas, not Lee Harvey Oswald, killed President Kennedy. He says the C.I.A. is concealing both the names and the whereabouts of the Cubans.

* * *

Mark Lane: There was one conclusion, one basic conclusion that the Commission reached, I think, which can be supported by the facts, and that was the Commission's conclusion that Ruby killed Oswald. But, of course, that took place on television. It would have been very difficult to deny that. *But, outside of that, there's not an important conclusion which can be supported by the facts and—and this is the problem.*

And what the Commission was thinking and what they were doing is still hidden from us, of course. The minutes of the Commission meetings are locked up in the National Archives and no one can see them. A vast amount of the evidence, F.B.I. reports, C.I.A. reports, which may be directly related to the information we should have, are also locked up in the Archives. No one can see that.

The photographs and X-rays of the President's body, taken at the autopsy in Bethesda, Maryland, taken just before the autopsy was begun, taken by Naval technicians, which in and of themselves might resolve the whole question as to whether or not there was a conspiracy, cannot be seen by anyone today and, in fact, not one member of the Warren Commission ever saw the most important documents in the case, the photographs and the X-rays. And not one lawyer for the Commission ever saw—was curious enough to examine the most important evidence.

I think the villain was the desire of government officials to be nice, to see to it that nothing would upset the American people, that the apathy which has seized us for all of these years be permitted to remain uninterrupted by a factual presentation of what happened. The American people would have been upset surely if they were told there was a conspiracy which took the life of your President.

Cronkite: *But Mr. Lane, who accuses the Commission of playing fast and loose with the evidence, does not always allow facts to get in the way of his own theories. In "Rush To Judgment," for example, he writes: "The statements of eyewitnesses close to the President tended to confirm the likelihood that the shot came from the right and not from the rear." Lane then quotes Associated Press Photographer James Altgens, and another eyewitness, Charles Brehm, as giving testimony that would support the idea of a killer on the grassy knoll. Yet Mr. Altgens,*

as we saw Monday night, is entirely certain that all of the shots came from behind, a fact that Mr. Lane does not mention.

As for Mr. Brehm, Eddie Barker discovered that he holds no brief either for the grassy knoll theory or for the use of his words by Mark Lane.

Eddie Barker: *Well now, some critics of the Warren Report have taken your testimony, or interviews with you, to indicate that you thought the shots came from behind the fence over there, what about that?*

Charles Brehm: *Well, as I say, it was not a number of critics. It was one critic, Mark Lane, who takes very great liberties with adding to my quotation. I never said that the—any shot came from here like I was quoted by Mr. Lane. Mr. Lane would like me to have positively identified the—what I saw fly over here—his skull—although I told him I could not—I did not—I thought it was but I could not. So, he has added his interpretations to what I said, and consequently that's where the story comes from that—that I said that the shots come from up there. No shot came from up there at any time during the whole fiasco that afternoon.*

Cronkite: *Nor are these the only examples of Mr. Lane lifting remarks out of context to support his theories. Perhaps the most charitable explanation is that Mark Lane still considers himself a defense attorney for Lee Harvey Oswald—and a defense attorney's primary duty is not to abstract truth, but to his client.*

* * *

Cronkite: *Despite Mr. Specter's defense, it is the opinion of CBS News that the role of the F.B.I. as well as the Secret Service, both in the assassination and its aftermath, has been less than glorious. And, to some extent, the performance of these agencies weakens the credibility of the*

Warren Report. As to what the F.B.I. and the Secret Service did wrong before the assassination, we need look no further than the Report itself.

It notes the Secret Service agents assigned to protect the President had been drinking beer and liquor into the early hours of the morning, that no search was made of buildings along the route, and that, quote: "The procedures of the Secret Service, designed to identify and protect against persons considered serious threats to the President, were not adequate prior to the assassination," end of quote. That is, the Secret Service should have known about Lee Harvey Oswald.

But the Report goes on to point out that if the Secret Service did not know about him, the F.B.I. did, and did not see fit to mention his existence to the Secret Service. The report issues a mildly phrased yet devastating rebuke to the F.B.I., charging that it took an unduly restrictive view of its responsibilities. Knowing what the F.B.I. knew about Oswald, the Report says, an alert agency should have listed him as a potential menace to the President. Yet, after the assassination, the Commission itself relied heavily on these two agencies as its investigative arms.

Did their performance improve? We know that some of the tests conducted by them for the Warren Commission were unsatisfactory. In the first of these broadcasts we pointed out that to simulate Oswald's problem of hitting a moving target from a sixty foot high perch, the F.B.I. conducted its firing tests on a fixed target, from a 30-foot height. Certainly, if CBS News could duplicate the conditions of the actual assassination for a firing test, the feat's not beyond the capability of the F.B.I.

Rather: *There is also the case of the famous exhibit 399, the bullet which the Commission thought wounded both the President and Governor Connally, winding up on*

the Governor's stretcher in Parkland Hospital. Critics of the Report, you will remember, insist it couldn't have hit both men but must have been found on the President's stretcher. Yet, part of the now permanent confusion surrounding the bullet and where it was found, must be charged to the cavalier attitude of agents of both the F.B.I. and the Secret Service at Parkland Hospital.

On Monday night, hospital attendant Darrell Tomlinson described how, in shoving a stretcher into place, he dislodged a spent rifle bullet. Mr. Tomlinson quite properly sent at once for the hospital's chief of security, O. P. Wright. Mr. Wright describes what happened then:

Wright: *I told him to withhold and not let anyone remove the bullet, and I would get a hold of either the Secret Service or the F.B.I., and turn it over to them. Thereby, it wouldn't have come through my hands at all. I contacted the F.B.I. and they said they were not interested because it wasn't their responsibility to make investigations. So, I got a hold of a Secret Serviceman and they didn't seem to be interested in coming and looking at the bullet in the position it was therein.*

So I went back to the area where Mr. Tomlinson was and picked up the bullet and put it in my pocket, and I carried it some 30 or 40 minutes. And I gave it to a Secret Serviceman that was guarding the main door into the emergency area.

Barker: *Mr. Wright, when you gave this bullet to the Secret Service agent, did he mark it in any way?*

Wright: *No, sir.*

Barker: *What did he do with it?*

Wright: *Put it in his lefthand coat pocket.*

Barker: *Well now, did he ask your name or who you were or any question at all about the bullet?*

Wright: *No, sir.*

Barker: *How did the conversation go? Do you remember?*

Wright: *I just told him this was a bullet that was picked up on a stretcher that had come off the emergency elevator that might be involved in the moving of Governor Connally. And I handed him the bullet, and he took it and looked at it and said, "O.K.," and put it in his pocket.*

Cronkite: *There is little to praise in such treatment by the F.B.I. and the Secret Service of perhaps the most important single piece of evidence in the assassination case. Moreover, the Warren Commission seriously compromised itself by allowing the Secret Service, the F. B. I. and the C.I.A. to investigate questions involving their own actions.*

Rather: *The Commission had before it the hard fact that Oswald's notebook contained the name, phone number and license plate number of Dallas F.B.I. agent, James Hosty. The F.B.I.'s explanation was that Hosty had asked Ruth Paine, with whom Marina Oswald was living, to let him know where Oswald was staying, that he jotted down his phone number and that Marina under prior instructions from her husband, also copied down Hosty's license plate.*

Cronkite: *The question of a link between the killer and the F.B.I. was indeed a legitimate part of the investigation. The Commission's handling of that question is scarcely justifiable. What it did was to accept as conclusive sworn affidavits from J. Edgar Hoover, and other F.B.I. officials, that Oswald was never employed in any capacity by the F.B.I.*

The Commission says it also checked the F.B.I.'s own files, but mentions no other investigation. It followed the same curious procedure with the C.I.A., taking the word of top C.I.A. officials that Oswald had no connection with that agency either. The Commission then came to the

sweeping conclusion that there was absolutely no type of informant or undercover relationship between an agency of the U. S. Government and Lee Harvey Oswald at any time.

Now, elsewhere, the Warren Report argues persuasively the difficulty of proving a negative, of proving in that case that Oswald was not a member of a conspiracy. You will remember that it hedged its conclusion, saying only that there was no evidence of a conspiracy.

Yet the Commission had no hesitation in asserting another far reaching negative: that Oswald was not involved with any agency of the U. S. Government ever. Oswald's mother, Marguerite, has always maintained that her son was a government agent—she favors the C.I.A.—and that he was innocent of the assassination.

Barker: *Mrs. Oswald, what sort of proof do you have that your son was an agent of this government?*

Marguerite C. Oswald: *Now, proof, Eddie—that's a very strong question. I think the Warren Commission members themselves gave Marguerite Oswald the proof. They want us to believe that Lee Harvey Oswald went to Russia as a defector. And yet he got out of the Marine Corps three years before his hitch was up on a Dire Need discharge. Now, this is documented. This is what they tell the American people. They go into great details, that Lee Harvey Oswald got out of the Marine Corps three months ahead of time because his mother had an accident —which was the truth, and it all went through the Red Cross legitimately.*

And when he came home, he stayed with his mother three days. We sort of know that story. And then he left for Russia. And, so, this is supposed to be all cut and dried. But when you read the Warren Report, and when you know the case—and this is my case, and my son's—

so I know it, then you see a little part where the Warren Commission says, the documentation says, that Lee Harvey Oswald was given a passport by the State Department to travel to Russia, the Dominican Republic, Cuba, and et cetera; and at that time these countries were not restricted.

Now, how can Lee Harvey Oswald get out of the Marine Corps three months ahead of time on a Dire Need discharge, and at the same time be issued a passport to travel?

Cronkite: *The evidence is overwhelming that Mrs. Oswald is wrong as to whether her son did assassinate the President. Yet, there remain disturbing indications that she may not be quite so wrong about some kind of link between Oswald and various intelligence agencies of the United States. The question of whether Oswald had any relationship with the F. B. I. or the C. I. A. is not frivolous. The agencies, of course, are silent.*

Although the Warren Commission had full power to conduct its own independent investigation, it permitted the F. B. I. and the C. I. A. to investigate themselves—and so cast a permanent shadow on the answers.

* * *

Rather: Right now, long after the fact of the Commission Report being out, right now, what bothers you most about the Report? Are there any—is there a central question, or central questions that bother you most?

Epstein: There is one central question that does bother me, and that is—involves the autopsy that was performed on President Kennedy. And there was a conflict—really, a contradiction, between the F. B. I. report on the autopsy, which the F. B. I. says they received from the autopsy doctors—at least they said in these reports, and the autopsy report published by the Warren Commission. And I don't

think we have to get into the exact details, but it wasn't absolute—if one was true, the other couldn't be true. It concerned the path of the bullet through President Kennedy's body. The F. B. I. said it didn't go through, it only went in a short distance. The Warren Report said it went—or the autopsy in the Warren Report said it went clean through and exited.

There was evidence, evidence that I think any lawyer or law court would have demanded, and that is the actual photographs of the autopsy and the X-rays.

Cronkite: *Almost from the day the Warren Commission published its report, its decision to omit those vital X-rays and photographs has been under attack. Only that physical evidence, say the critics, can finally resolve the debate over how many bullets struck the President, where they came from, and where they went—the central questions in the argument over how many assassins opened fire in Dealey Plaza.*

More than one critic has charged that the autopsy record in the Warren Report is not the original autopsy, but has been changed to conform with the Commission's theories. You will remember that after a silence of three and a half years the doctor who headed the autopsy team at Bethesda Naval Hospital agreed to re-examine those disputed photographs and X-rays, and review his findings for these broadcasts. And here is what Captain James Humes told Dan Rather.

Humes: The Report, as I stated, is exactly the way it was delivered, and the way it was written.

Cronkite: *Yet it seems to CBS NEWS that one of the most serious errors made by the Warren Commission was its decision not to look at those photographs and X-rays, an error now compounded.* For the Kennedy family, which had possession of the autopsy pictures, agreed last year to

donate them to the National Archives, but only with the stipulation that the pictures be locked away for five years—with only certain authorized government personnel allowed to see them.

Now, no one would propose that those grim and tragic relics be made generally available, to be flashed across television screens and newspaper pages. But in view of their crucial bearing on the entire assassination we believe that those films should now be made available for independent examination by expert pathologists, with the high qualifications of Captain Humes—but without his status as a principal in the case.

There is one further piece of evidence which we feel must now be made available to the entire public: Abraham's Zapruder's film of the actual assassination. The original is now the private property of LIFE Magazine. A LIFE executive refused CBS NEWS permission to show you that film at any price, on the ground that it is, quote, "an invaluable asset of Time, Inc." unquote. And that, even though these broadcasts have demonstrated that the film may contain vital undiscovered clues to the assassination.

LIFE's decision means you cannot see the Zapruder film in its proper form, as motion picture film. We believe that the Zapruder film is an invaluable asset, not of Time, Inc.—but of the people of the United States.

* * *

CBS Reports, "Black Power, White Backlash," September 27, 1966

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Wallace: That was Ivan Allen, the Mayor of Atlanta, Georgia . . . a leading moderate on racial matters in his native South. He strongly favored, and testified in behalf

of the 1964 Civil Rights Bill. His city has long been looked on as remarkable for its progress in relations between the races. It is also the home of the National Headquarters of SNCC—The Student Non-violent Co-ordinating Committee.

(Black Power chants)

The head of SNCC is Stokely Carmichael, a twenty-five-year-old revoluntionary, born in the West Indies, educated at the best high school in New York, a college graduate, with a degree in Philosophy. It was here in Mississippi this summer that Carmichael—with his cry for "Black Power"—became a national figure, and . . . to many . . . a frightening one.

(Black Power chants)

I talked with Stokely Carmichael one night earlier this month, in Atlanta. He wore an African toga given him by Sekou Toure of Guinea . . . a reminder—he said—of his African heritage.

Carmichael: I think that there's a realization that black power is not just a mere slogan, nationally or internationally. It is real that black people can come together and start determining for their lives how they're going to live and controlling their economic and political lives.

Wallace: But why talk about dynamite sticks if Molotov cocktails won't work? When you talk of black power, building a movement that will smash everything that Western civilization has created, when you say that black power should bring the country to its knees any time it messes with the black man, and these are quotes from Stokely Carmichael, the picture has got to be, in the minds of white men and black men, one of a man who threatens violence.

Carmichael: On the contrary, if you say that you have to bring the country to its knees if it messes with the black man, you're saying that the only protection for black people is that they unite, so that when one black man is touched because he's black there's some protection for him. Now, it's obvious that that protection does not exist in this country. It does not now exist. And the only people who can have that protection are black people, and black people know that. Now, white people may not know that. So it means that you have to build a movement so strong in this country that if one black man is touched every black man will rise up and let this country know that they're not going to tolerate it.

Wallace: If one man—if one black man is touched?

Carmichael: That's right. Because he's black. I mean, if a black man is walking down the streets of Mississippi, down the highway with a Bible in his hand, he is shot because he is black.

Wallace: That's one incident . . .

Carmichael: I can name you a lot others, and you know that yourself.

Wallace: In the Northern ghettos.

Carmichael: *If one black man in California is driving his pregnant wife to the hospital and he is shot by a white racist policeman.* I can name you more incidents.

Wallace: Then, you're saying, "Fight violence with violence?"

Carmichael: I'm saying that we must build a movement of black people that will protect ourselves so that we are willing to stop that by any means necessary. Now, I'm not concerned about the question of violence. It seems to me that that will depend upon how, in fact, white people respond. If white people, in fact, are willing not to bother with black people because they are black, then there's going to be no question of violence.

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Wallace: When you read stories about difficulties, riots, in Omaha or Cleveland, or Brooklyn, or Chicago, or wherever . . .

Carmichael: I call them rebellions.

Wallace: They're rebellions, and you see nothing wrong with them?

Carmichael: I think that it is people who are rebelling against a system that has locked them inside tight ghettos, that exploits and oppress them and they have no means of redress to break that system down. We intend to build within black people the realization that that problem is not theirs, that it was created by white society. It's purposely created by white society and then they throw it back on us and blame us.

* * *

Wallace: You're one man, you're one black man who went to a good, essentially white high school in the City of New York . . . You obviously have had a good education. A good many of the people who work with you here in SNCC can say the same thing . . . And you're a black man who came from a New York ghetto.

Carmichael: And we're saying that there's a system that allows for one or two black people to get out. And that that's the rationale for keeping the other black people down.

Wallace: *And it has nothing to do with the unwillingness or inability of the Negro to help himself and to work hard?*

Carmichael: *That's the rationale, that the reason why black people are this is because they're lazy, unambitious, stupid, have rhythm and eat watermelon.*

Wallace: You call on the black man to refuse to respond to his draft call.

Carmichael: That is correct, and we will continue to do so while there is breath in our bodies.

Wallace: Do you really believe that the military policies of the United States are designed to exterminate the black man, as you've said?

Carmichael: I most certainly do. I look at the recent statement by *racist McNamara,* who says that thirty percent of the people that are going to be drafted now under his new system are going to be black people, and that's nothing more than black urban removal.

Wallace: The white liberal, who supported civil rights for so long with time and effort and money . . . what is your feeling about him?

Carmichael: Well, I think that there's no reason they should stop supporting the movement now. I certainly feel that if they're genuinely interested in black people, and since black people have charted a course, if they believe in that program they will continue to give to it.

They need more white people to civilize whites. *They need them to civilize the savages in Cicero who throw rocks and bricks at a peaceful and lovable black man like Dr. Martin Luther King, who would not even hurt a fly. That's very important . . . because our uncles and our fathers and our older brothers died in World War I fighting Nazism to protect the Poles and those same Poles turn around and throw rocks and bricks at us after we died to save their lives. And people talk about we are savages.*

* * *

Watts: . . . I feel that at this juncture, because over a period of a hundred years *the white establishment has built a barrier between the white power structure and the black community, this barrier being a wall consisting of neurotic white liberals and their house niggers that they draw from the community with their various lame-brain schemes to integrate us.* The first thing that we have to do is knock this wall down forcibly, in order to confront the white power structure with our demands.

Wallace: *Who are the house niggers you are talking about?*

Watts: *Roy Wilkins. Your Martin Luther Kings. Your Whitney Youngs.*

* * *

Wallace: If there was a symbol of white anger at Negro protest in the North this summer, it was Cicero, Illinois, a town chosen by Dr. Martin Luther King as the pressure point in his open housing drive. *Cicero is a town with an inferiority complex. It winces at public attention because, back in prohibition days, it was notorious as the home of Al Capone, of bootlegging, B-girls, gambling.* Today, it just wants to be left alone. But Dr. King had other ideas.

King: *I think Cicero in the North symbolizes the same kind of hard core resistance to change as Selma in the South. And I think it will in fact eventually be the Selma of the North* in the sense that we've got to have a confrontation in that community.

Wallace: *Cicero is no stranger to racial violence.* Fifteen years ago, a Negro family tried to move into this apartment dwelling there. An angry mob tossed the family's furniture out a third floor window and made a bonfire that blazed 10 feet high. The National Guard had to be called in to restore order. No Negro family has tried to move in since.

But late in the summer, Negroes marched on Cicero . . . led by militant organizations. And once again, the National Guard had to be called out, to prevent bloodshed. The reaction of some of the residents of Cicero and many whites from surrounding areas was predictable. Bricks, bottles, taunts and catcalls were aimed at the marchers. The hostility was mutual . . . bitter . . . and undisguised. The question was why? Why Cicero? And is this the kind

of reaction we can expect all across the North, as Negroes press to live in white communities?

Cicero is a town of first and second generation Americans . . . mostly Czechs, Poles, Lithuanians, Italians, plus a late sprinkling of whites up from the United States South. Mostly blue collar workers, hardworking, law-abiding, overwhelmingly Republican, overwhelmingly for Goldwater in the last election. Homes are built one hard upon the other, scarcely a step apart. There is little vacant land in Cicero, virtually no slum, and there is fierce pride in property.

The average person out here—he's not a bank president, he's not a wealthy industrialist—he's an $80, $90, $100-a-week man. Maybe now, when times are good . . . he's making a hundred and twenty. The biggest investment he'll ever make in his life is that house. That house to him means . . . it's everything in the world for him. When someone is going, is going to bring down the value of that home or destroy it or his neighbor is going to live in such a way that it may affect his property, this hits him right in the heart and in the pocketbook both, and he'll fight for it.

Wallace: I walked down 25th Place, an attractive if modest residential street, picked at random . . . houses worth $15,000 to $25,000. Why, I wondered, is it so important to keep Negroes from living here? As you listen to the answers, ask yourself how different is the reaction in your own community.

Man: Well, I'll tell you. *Property depreciates when Negroes move into a certain neighborhood. They'll buy one building, and there'll be a dozen families move in that building . . . and you got a mess.*

Wallace: Of course, these are just one-story, one-family buildings here, most of them . . . some of them two families.

Man: Well, if they bought this building here, which is a six room apartment, they might have two families living in there. They might put another family down in the basement—maybe two families down in the basement. There, you take and have a messed area.

Wallace: So, it's just because you think they might be messy neighbors. That's the only reason?

Man: That's all. That's the only reason. If there was one family in one building and they took care of their place, I don't see why people wouldn't tolerate them.

Wallace: How would you feel about Negroes moving in here to Cicero?

Little Girl: Well, I really don't know. Some Negroes are clean and some aren't. If they moved in on this block and they were clean, I would play with them.

Wallace: What does your Mom and Dad say about it?

Little Girl: Well, they say—well, I really don't know. They don't say too much about it.

Wallace: Are they enthusiastic or no?

Little Girl: No. My Dad said that if they do . . . well, we're just going to have to move . . . . . maybe.

Wallace: Is that your Mother up there working?

Little Girl: Yes, it is.

Wallace: Let's see if I can't talk to her for just a moment. Ma'am, I wonder if I could ask you to come down the stairs just for a minute and talk to me. There's been so much talk recently about Cicero and Negroes and property values, what's your view?

Woman: Well, I'm perfectly satisfied with the neighbors we have. We have old homes here; we take very good care of them.

Wallace: I see that you do.

Woman: And, when it would come right down to it, I don't think we would object to other neighbors if they would come up to our standards of living.

Wallace: Do you think that the fact that a man is a Negro, or a woman is a Negro—on the face of it simply makes them an undesirable neighbor?

Woman: No, not really. I have known so many colored people that are so nice, but like I say, *I think they have to learn to live the way we do, and take care of things.*

Wallace: How do people learn to live that way?

Woman: Out of hard work. We have worked very, very hard for what we have. We've been here thirty years and we didn't get anything for nothing. We worked very hard for what we have, and we're still working hard to maintain it.

Wallace: How would you feel, truly, if a colored family were to move in over there where the wash is hanging on the line?

Woman: Well, I don't know. . . . I really couldn't say. I'd probably get along very good with them. If they leave me alone, I leave them alone. *I'd probably be afraid to go out at night* (She Laughs)

Wallace: *Afraid to go out at night?*

Woman: *On account of the colored people living around here.*

Wallace: *Do you mean—do you think they're a violent people?*

Woman: *Some of them are. There are some that really would be like that.* And there are some good ones too. *You really couldn't trust any of them.*

Young Boy: There are many good coloreds, and I worked with some of them and I like them, and I like this person that I said works at the lounge over there. But the ones that are going to march, I don't like, and I can't stand. I got no use for it.

* * *

White Woman: *But I don't want to live with them.*

Wallace: *Why?*

White Woman: *Because I moved out of a neighborhood that was colored. I had to move. Everybody that lives with the colored has to move.*

Wallace: *Why?*

White Woman: *Because you're not safe walking the streets at night. You cannot leave the house.*

* * *

CBS News Special Report "Civil Rights: The View from the South," July 12, 1966

* * *

Mike Wallace: But how can you—how can there be a reconciliation in Mississippi unless the responsible civil rights leaders and the responsible leaders in the white community establish a dialogue as, for instance, they have in Arkansas, as they have in Louisiana? I'm certain that you want that as much as anybody——

Governor Johnson: We have a dialogue in our state. You have a dialogue between the Governor and any responsible Negro citizen of the State of Mississippi.

Mike Wallace: Who determines whether that citizen is responsible or not? The Governor?

Governor Johnson: I would, as you would, as to who would come and visit you at your home or at your office, but I would like to point out to you that *we have very very few, if any, real Negro leaders in the state who have taken a non-violent attitude.* Now, the one thing that we're going to insist on in our state——

Mike Wallace: *Certainly the N. A. A. C. P. has, Governor Johnson. Certainly they have, and certainly S. C. L. C.*

Governor Johnson: *No, they have not. They laid down in the middle of the highway. They chucked rocks, bottles, at people, down at Alcorn College, in the middle of the highway——*

Mike Wallace: *Without provocation, sir?*

Governor Johnson: *Yes. Without provocation, because they were—they were being led by a group who did, to a great extent, believe in violence.* If they had not, they would have had a group that they could—could control and would take orders, do as they said. Now, the people who come into my office are Negroes by the thousands. I have appointed on many commissions in my state outstanding Negroes who are serving on commissions and on boards now that pertain to education, that pertain to the food stamp program——

Mike Wallace: *But you won't sit down with the civil rights leaders, any of them, Aaron Henry, Charles Evers.*

Governor Johnson: *No. I don't, because I don't consider them as the responsible leaders of the Negro community in my state.*

* * *

Mike Wallace: Black power in Mississippi, Governor Johnson?

Governor Johnson: Black power, of course, this phrase was begun in Mississippi about two weeks ago during this march. *This chant came from Negroes in this country who class themselves as civil rights leaders, who are—have shown great irresponsibility.* I think that the black power slogan that they have come out with certainly points up to the rest of the people of this country, both black and white, that what they would do, if they are irresponsible as citizens, what would they do if they had power? So this black power structure that you hear so very much about is more or less the chant of the irresponsible Negro and irresponsible white of this country.

Mike Wallace: They would say to you that the Negro is frustrated by his inability to crack the barriers of white power, the economic barriers, the political barriers, the

social barriers, and that really all they want to do is where they are in the majority have the right to control their own destiny, economically, politically. Isn't really that what—what black power means?

Governor Johnson: I don't think that that is what these people believe that black power means, because they are the irresponsible, violent-type persons in this country, and people, whether they are white or whether they are black——

* * *

CBS Reports, "Murder and the Right to Bear Arms," August 7, 1966

* * *

. . . This senseless killing of two policemen, which left six children fatherless, was committed, authorities say, by a man carrying a concealed weapon. How he legally bought the gun and how he used it was traced by David Lowe of CBS NEWS.

Lowe: *In November 1963, Leaman Russell Smith, after serving a sentence for robbery, was conditionally released from Leavenworth Penitentiary in Kansas. Warden John C. Taylor said:*

Taylor: *Smith has lived a life of violence and, of course, he relies on weapons and the first thing he would think of when he gets out is to get a weapon so he could enforce his will,* and Smith could have purchased a gun within thirty minutes after we released him if he had not been released in custody. There's no law in the city of Leavenworth or the State of Kansas to my knowledge that would prevent a prisoner being released from an institution walking in and buying the gun over the counter just like a pound of coffee.

Lowe: A month later, on December 19th, in Flagstaff, Arizona, it is claimed the ex-convict, using an alias of Lawrence Parker, bought a gun in Andy's Liquor and Sporting Goods Store. Proprietor Andy Buntin recalls the sale.

Buntin: Well, to the best of my recollection, Mr. Lawrence Parker came in and wanted to buy a .38 snubnosed Smith & Wesson, which is this gun right here. They call this the airweight. It's a very light model of the .38-caliber gun.

Lowe: Could you tell me about the laws concerning the sale of pistols here?

Butin: Well, anyone can buy a pistol but I have to register the pistol at the time he purchases it. By that I mean that I have to record the serial number and the man's name and address.

Lowe: You don't have to ask him if he's an ex-convict?

Buntin: No.

Lowe: You don't have to ask him any question whether or not he was in a mental institution?

Buntin: No.

Lowe: On the evening of February 1st, authorities charge that Smith, carrying the .38-caliber concealed weapon he bought in Flagstaff, Arizona, entered a Sears Roebuck store in Los Angeles. Reportedly, he tried to cash a fraudulent check. The cashier became suspicious. Approximately 8:21 P. M., police officers Endler, Monaghan and Jurman arrived. There were five shots and seconds later Officer Endler and Sergeant Monaghan were dead, Jurman wounded.

Police learned the suspect got out of Los Angeles on a freight train the night of the killing. The next day he was reported seen in Denver, Colorado and the Denver police broadcast an alarm.

Bulletin: . . . reportedly is always in possession of two .38-caliber revolvers, one of which he carries on the left front inside his trousers. Considered extremely dangerous.

* * *

Maxwell: If you want to buy a gun, why, you could just go in and buy it. There's no—he could ask you questions, but you wouldn't necessarily have to tell him anything. You can buy a gun under any name you wanted to buy it under. *As I say, these people are in business to sell guns and they don't care whether they sell it to John Doe, or Joe Blow, or whatever the name is, as long as they get their money.*

Lowe: *Andy's Liquor and Sporting Goods Shop bought the weapon from Babbitt Brothers, a wholesaler in Flagstaff, who in turn purchased it from the manufacturer, Smith & Wesson in Springfield, Massachusetts.*

* * *

Trout: Whether they are for a mentally ill woman in Virginia, a playful child in Texas, a juvenile delinquent in California or for a criminal in Illinois, millions of guns are available and easy to buy by mail or in stores.

The selling of guns by mail has become a multi-million dollar business. To reach buyers dealers use trade magazines, newspapers and catalogs. *One well-known dealer, the Service Armament Company in Ridgefield, New Jersey, issues a colorful inventory of items with advertising geared to entice the reader. The Persian Mauser Carbine is advertised to be "short, deadly and compact." The catalog says, "The Shah himself test-fired each gun." If you'd rather not trust the Shah, you can buy a Beretta automatic pistol advertised as "the choice of soldiers of fortune everywhere." A Nazi P-38 pistol sells for less than forty dollars, and ammunition to fit is available at five dollars a hundred rounds. For the man who wants something heavier there*

is a goodly selection of machine guns. A German bazooka is available for twenty dollars. And for the man who has everything—an anti-tank gun. This handy item was recently purchased by two fun-loving young men from New Jersey, who hauled it to a hilltop and shot up a tractor a mile away. Inside the back cover of the catalog, the Service Armament Company warns: "Firearms and dangerous weapons not sold to minors; parents may order for them."

* * *

Trout: Last month near Wapella, Illinois, Treasury Agents seized a stockpile of weapons—enough to outfit a small army—including submachine guns, a flame thrower, aerial bombs, mortars, automatic pistols and rifles. Arrested was a one-time regional leader of the Minutemen.

The Minutemen—a self-styled guerrilla force of extreme views—train with weapons for the day they fancy they will be called on to fight in the streets. Some members were filmed on maneuvers in another state. According to a recent ruling by the United States Attorney General's office: "There is no evidence that the Minutemen organization has violated any Federal laws."

* * *

Senator Ralph Yarborough: The opposition of the National Rifle Association of which I am a member and have long been a member is one of the main factors that's organized to fight this. I think they are utterly wrong. *I think they almost join the frenetic fringe in the type of lobbying they do.*

* * *

CBS Reports, "Robert F. Kennedy," June 20, 1967

* * *

Mudd: One of the obvious disadvantages is that most of the John Kennedy haters of the early sixties—some

Southerners, businessmen and conservative suburbanites—have now become the Bobby-haters of the late sixties. *And even some anti-Kennedy Democrats—such as maverick Mayor Sam Yorty of Los Angeles—resent what they regard as the Senator's deliberate attempt to capitalize on the memory of John Kennedy.*

Mayor Samuel Yorty: *I think so. I think he's trying to ride on the—on the name of President John F. Kennedy and the good will that the people feel toward him, especially since he was a martyr, and I doubt very much if he could have been a Senator without his father's fortune and his brother's fame.*

* * *

Mudd: Perhaps Kennedy's dissent is designed to establish himself as the alternative leader of the Democratic party. Whatever his motives, his dissent has broken the President's seeming ownership of every phase of Washington life. He has made the capital a two-man town. *Los Angeles Mayor Yorty has no doubt that every Kennedy move is calculated.*

Yorty: *I think he has this all figured out. His stand on the bombing does endear him to pacifists and the left wing, those who are dupes of the Communists, those who are Communists and some people who just, of course, have been misled and I think his feeling is that if the war ends well, that it will all be forgotten and if it doesn't end well, he could say, "Well, I told you so, we should have stopped the bombing."*

Mudd: *Sam Yorty, who was subjected to a rugged Senate interrogation by Kennedy after the Watts riots, is convinced of the fitness of the word most commonly applied to Robert Kennedy—the word "ruthless."*

But for members of the Senator's family, who claim they know him best, the word has an amusing ring.

(Mudd Talking to Senator Edward Kennedy:) But you're competitive and you have strong feelings, and I don't hear Edward Kennedy described as ruthless. What's the difference?

Edward Kennedy: Well, I suppose you couldn't have two ruthless brothers.

Mudd: *But it is no joke to those who harbor resentment at their treatment by Kennedy: The tv producer who got pushed too hard in the 1960 Wisconsin primary; the Democratic Senatorial candidate in Nebraska who got scorched because he couldn't pull the party together; the over-worked Justice Department lawyer during the Hoffa prosecution; the New York voter who still sees Kennedy as a power-grabbing carpetbagger.* And it is no joke to those who have only read about Kennedy's reputation and who are eager to believe everything bad about him. *The word "ruthless" was probably first applied to the Senator ten years ago when he was the combative, bird-dogging chief counsel for the Senate Rackets Committee; it gained currency during 1960 when he managed his brother's presidential campaign, and when his style came across to the old-line Democratic pols as too tough, too self-confident, too sophisticated.*

It became established in the early sixties when as Attorney-General he pursued the demons of segregation, racketeering, and price-rigging in a way many thought *too zealous;* and it was kept alive in 1964 when he switched allegiance from his native state of Massachusetts to New York simply because there was a political opening. Today the "ruthless" reputation is not any longer a matter of proof or disproof; it is, whether justified or not, a fact of life for Robert Kennedy, and there seems little he can do to change the minds of those who do not want their minds changed.

In listening to the next six persons, remember they are all talking about the same man.

Gore Vidal: *He's much too abrasive. He's much too rude.*

Pierre Salinger: He is terribly concerned about people around him. He is terribly concerned about people in general.

Mayor Yorty: *He's been built up with this almost idolatry around him and I guess he just feels that everybody should defer to what he wants and to accept his judgment on all problems.*

Edwin Guthman (Former RFK Assistant): I think it stems mostly from the fact that he's had the courage of his convictions, and the courage to do what he thinks was right and to take it head on, and so people who don't like what he's done have said, "Well, he's ruthless."

William Manchester: I would describe Bob as dedicated and loyal. *I would qualify that by saying that Bob believes so strongly in the ends he is pursuing, that he is not over scrupulous about the means that he employs.*

Joseph Dolan (RFK Administrative Assistant): He's a strong individual, in the sense of character and determination, but I don't think he's ruthless if that's—if that's what you mean. He's determined and persistent.

* * *

Mudd: The Senator has three legislative assistants: 36-year-old Wendell Pigman, graduate of Cornell, Princeton, the Budget Bureau, the Space Agency, and the expert on science and natural resources.

Twenty-nine-year-old Peter Edelman, a graduate of Harvard Law, who clerked at the Supreme Court, and worked briefly for the Justice Department. Edelman does most of the research on poverty and labor legislation.

And Adam Walinsky, 30-year-old Yale School graduate, also up from the Justice Department, *known as brash and cocksure,* but undeniably talented. He works mainly on foreign affairs.

* * *

Mayor Yorty: I think he's trying for the Presidential nomination, yes. I think he has tried to build his political image for 1968 or 1972. I think he's—he was trying to keep himself in the position of having alternatives, being flexible. I think he is—*he's almost insidiously clever about the way he figures the political possibilities.*

Pierre Salinger: Well, it's very hard, I suppose, for a person who is as much in the forefront in political life as he is—who is, for example, constantly pitted in polls against various candidates—not—I mean, the thought has got to—crosses his mind . . . but if you asked me whether I thought that every single deliberate act of his life was aimed at getting to the Presidency, I would say no, because I know—I've talked about this subject with him.

Gore Vidal: Yes I think he's consciously and deliberately running for President. How could he not? *He has this sense—this family sense that it is written in stars that they be first, and he's doing everything possible.* I think the signs of gloom that you get in some of his statements when he says—"How can you plan ahead—who knows if one is going to be alive"—I think that's quite sincere, but we all feel that if we are at all thoughtful. But you always act as though you will be alive and you make the movement toward what you want. What he wants is the Presidency.

* * *

CBS Reports, "The New Left," September 12, 1967

* * *

Stout: The Mississippi project more than doubled Negro voter registration from 25,000 to 68,000. But even

with that, the Negroes had no voice; so the Mississippi Freedom Democratic Party was formed. Fannie Lou Hamer, a leader in the voter project, explains.

Fannie Lou Hamer: We didn't have no other choice except being a Freedom Democratic Party because what had happened—we tried from the beginning, from the precinct level to go into the regular party. And after we wasn't accepted, we decided to have something of our own—not just for black people in Mississippi, but for white as well.

Stout: Bob Moses, Mrs. Hamer, and Aaron Henry led the Freedom Party delegates before the Credentials Committee of the Democratic National Convention, summer 1964, Atlantic City. Their demand to replace the segregated, all-white Mississippi delegation was a critical test of the values of American liberalism and it was posed, above all, in moral terms.

Aaron Henry: We don't think that there can be any compromise with what we consider a wrong position or a wrong element. We don't think that the Mississippi Democratic Party espouses the philosophy of the national Democratic Party and we think that we do. And we don't see why there should be any compromise between an issue that is involved in this much of being right or being wrong.

Stout: The settlement worked out by Hubert Humphrey with White House approval was a political compromise offering two seats to the Freedom Party, the rest to the segregationist delegates. To party politicians, it was just one more compromise needed to hold together hostile groups making up the Democratic coalition. But to members of the Movement, it was something else.

Fannie Lou Hamer: *But I think what happened to us in Atlantic City made people really aware that the government is not really with the people, for the people, by the*

people but for a handful of folk. And the people don't have anything to say.

We were told there if we kept up what we was doing, that the Vice President wouldn't be nominated that night. And that's when I asked Mr. Humphrey: Was his position, one man, more important than black peoples' lives in Mississippi that was suffering through what they had gone through. And then after that, I wasn't allowed to go to no other meetings with the big, top leaders.

Stout: In the literature of the New Left, Atlantic City is described as conclusive evidence that for the young radicals, liberalism could no longer serve as a vehicle for social reform. *The New Left's opinion of liberals was reinforced nearly three years later when Hubert Humphrey publicly embraced Lester Maddox who, before becoming Governor of Georgia, had waved a pistol and prescribed axe handles as the answer to demands for racial equality.*

Lester Maddox: Say, you customers, go get some more axe handles.

Stout: To the young radicals, black and white, who had been in Mississippi, Atlantic City was the turning point. It proved to them that they could trust no one over 30, certainly not on moral issues and especially not liberals.

In the fall of 1964, students of the New Left went back to the campus carrying with them some of the hard lessons of civil rights and political reality. They claimed the right to continue their political activity on campus and the moral clash of the summer now became a battle against bureaucracy.

Peter Paul and Mary (Singing): "How many roads must a man walk down before they call him a man . . ."

Stout: At the University of California in Berkeley, the square in front of the Student Union was traditionally open to speeches, discussion, and debate. Then without notice,

the University ordered a ban on all political recruiting and fund-raising in the square.

Peter Paul and Mary (Singing): "The answer is blowing in the wind. . . ."

Stout: To students like Mario Savio, who had already been bruised in the civil rights battle, it was another move by the faceless bureaucrats to enforce their decisions without consulting those directly involved. But this time the students fought back. *Their Free Speech Movement quickly evolved into a larger indictment of the university as a knowledge-factory.*

Jack Weinberg: *This is mass production. No deviations from the norms are tolerated. Occasionally a few students get together and they decide that they are human beings. Some students get together and they decide that they are not willing to be products. They decide they're not willing to be another thing produced by the university.*

Policeman: Have you identified yourself? You would be disciplined by the Dean's Office. If you're not identifying yourself, we're arresting you because you must be an outsider.

Weinberg: What—what section?

Stout: The university said the state's authority to regulate political activity on state property could not be challenged. Three months of conflict between the students and the administration finally brought an announcement of concessions by President Clark Kerr.

* * *

Stout: Carmichael's early definitions of black power seemed no different than the calls for Irish, Polish, or Italian power that resulted in ethnic bloc voting in the cities.

Carmichael: Black power is not just a mere slogan nationally or internationally. It is real that black people can come together and start determining for their lives how

they're going to live and controlling their economic and political lives.

Stout: *But the scare-headline potential of black power proved irresistible both to Carmichael and to reporters.* They prodded him repeatedly to redefine black power closer to terms of the defensive violence he advocated to Negroes when they were attacked.

Mike Wallace: Then you're saying, "Fight violence with violence?"

Carmichael: I am saying that we must build a movement of black people that will protect ourselves so that we are willing to stop that by any means necessary. Now I'm not concerned about the question of violence. It seems to me that that will depend upon how, in fact, white people respond.

Stout: Carmichael has been touring Communist nations. The deepening Negro radicalism is seen also in the Black Panthers' armed march on the California Capitol as well as in RAM, the pro-Chinese Revolutionary Action Movement. The increasing identification of the U. S. Negro with the plight of colonial colored peoples climaxed with SNCC support of the Arabs against Israel. *The most violent extremism has been urged by the new head of SNCC, Rap Brown, who has been charged with inciting to riot.*

Rap Brown: We stand on the eve of a black revolution, brothers. Masses of our people are in the streets. They're fighting tit for tat, tooth for tooth, eye for an eye, and a life for a life. The rebellions that we see are merely dress rehearsals for the revolution that's to come. We'd better get ourselves some guns and prepare ourselves.

Stout: But many Negroes feel that Brown, Carmichael, and SNCC, are only scapegoats to absorb official anger and frustration.

* * *

Stout: *The Newark Democratic city administration generally ignored the SDS organizers, except to brand them troublemakers.* Far bigger trouble erupted the night of July 12th of this year. We talked to Hayden three weeks before the riots. His awareness of what could happen was coupled with a sense of inevitability.

Hayden: If things are as bad as we think they are, if the schools in Newark where I live are, in fact, on the average 75 years old, if unemployment is 15 per cent, if all these problems exist, then you have to ask yourself the question: Why have the leaders not been able to do something about this and are the leaders the people to organize if you want to make change?

The War on Poverty may have had decent Democratic intentions at some point, but has turned out to be a very serious fraud. And it is not stopping racial violence at all, but encouraging it because *it's one more promise that's not being kept by the Federal Government.* So I would say it is—it is an attempt to—an artificial attempt to restore law and order to a situation that is basically unjust and until you deal with the injustice in the situation, you won't be able to have any peace.

Stout: While civil rights and social justice for the poor had been the main causes engaging the young radicals, the steadily escalating war in Vietnam soon became the overriding issue. Indeed, it joined all the scattered elements of the New Left and it drew in from the outside many people, including some of the liberals whom the radicals blame for starting the war.

Student Demonstrators: Go. Go. Go.

Stout: Again student dissent first brought the issue to the attention of the country. Young people from the Berkeley campus tried to stop troop trains and marched on the Oakland port of embarkation to protest the war. It was

the start of a series of protests culminating in New York and San Francisco last April 15th.

Phil Ochs (Singing): "Now the labor leader's screaming/when they close the missile plant/United Fruit screams at the Cuban shore/Call it peace or call it treason/Call it love or call it reason/But I ain't a-marching any more. No, I ain't a-marching any more."

* * *

Stout: But the general distrust felt by the New Left for all shades of liberalism includes the Senator.

SDS Member: Kennedys and Hatfields are not the vehicle. Now what we don't have—"the ideology" yet. I think we have learned from experience that perhaps committees for new politics, perhaps third party movements are what are necessary in this country, and that if it takes us 10 to 15 years to build a constituency, perhaps it's worth it. But if we, in a sense, transfer our allegiances to Kennedy, as many have suggested, where are we to go from there? Once Kennedy has co-opted us, in a sense, and told us about "his new Frontier," what's to prevent him from pulling off another Guatemala or another Cuba?

Stout: *That kind of suspicion among the young has been fed by two exposès in the San Francisco magazine, "Ramparts"—one about Michigan State University's role in building a secret police force for the Diem regime in Vietnam, the other revealing the C. I. A.'s penetration of student organizations.* "Ramparts" editor-in-chief, Warren Hinckle.

Warren Hinckle: *The central point about the C. I. A. which its—its defenders just will not discuss, is that the C. I. A. is out of hand.* It is, you know, not only the worst example of Parkinson's Law, but it's—it's the most rambling, well-fed bureaucracy in America today. It has

essentially no congressional controls on it, on how its money is spent, on what it does. Take that criticism for whatever you may—that you shouldn't expose those sort of things—but you notice that the President and the leaders of Congress jumped as soon as we exposed that thing and had a commission and reported three weeks later this was a bad thing to do and that they were going to stop it.

Stout: If the young radicals are suspicious of the liberal Establishment, they are frankly bored by communism.

Tom Hayden: Communism as a force domestically in this country is virtually non-existent. *The traditional Communist Party in this country in my own view—and I'm speaking here primarily as an individual—has really adjusted itself, accommodated itself to the—to the American way of life too deeply to be considered radical or revolutionary.*

* * *

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 16,498

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,
vs.
UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

Petition for review of an order of the Federal Communications Commission

SUPPLEMENTAL EXHIBIT TO REPLY BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

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INDEX

PAGE

CBS Reports, "Ku Klux Klan: The Invisible Empire," September 21, 1965 1

CBS Reports, "Biography of a Bookie Joint," November 30, 1961 29

Face the Nation, Representative-Elect Adam Clayton Powell, Jr., January 14, 1968 55

Commission's Summary of Programs Attached to the The Commission's Ruling in *Times-Mirror Broadcasting Co.,* 24 Pike & Fischer, R. R. 404, 409-412 (1962) 75

NOTE

Collected below (pp. 1-54) are examples of news documentary programs which would be subject to the Commission's revised personal attack rules. Statements in these programs which are at least arguably "personal attacks" have been italicized. We are setting forth the entire scripts for these examples of news documentary programs in support of the contention in Point II (1) (a) of our reply brief that the Commission's revised rules will make it impractical to produce programs of this type.

Also printed in this Supplemental Exhibit (pp. 55-74) is the full script of a *Face the Nation* interview with Representative-elect Adam Clayton Powell, Jr. Again we have italicized those statements which are at least arguably "personal attacks." We have set forth the script of this interview in support of our contention (reply brief Point III) that, while this interview is exempt from the personal attack rules, the Commission's new fairness doctrine obligation for exempt programs will inhibit discussion of controversial issues in such programs.

CBS REPORTS,

"Ku Klux Klan: The Invisible Empire"

September 21, 1965

KURALT: The driver of this car was Mrs. Viola Liuzzo, mother of five children. Twenty miles from Selma, Alabama, on Route 80, a red and white sedan overtook her car. Several shots were fired. The driverless car veered off the highway and came to a stop at a cattle fence. Mrs. Liuzzo was dead. *Arrested and charged with murder were three alleged members of the Ku Klux Klan.* One was tried and the jury was unable to reach a verdict.

This is an earthen dam, the temporary grave of three civil rights workers, two white, one Negro—Mickey Schwerner, Andrew Goodman, and James Chaney—beaten and shot to death. *Among those indicted for this triple slaying were six men identified as members of the Ku Klux Klan.* None has been brought to trial.

In this automobile, Reserve Lieutenant Colonel Lemuel Penn was killed by a shotgun blast while riding through Colbert, Georgia. *Arrested for this crime were four Knights of the Ku Klux Klan.* Two Klansmen were tried and acquitted.

In a few short months: five murders, thirteen alleged members of the Ku Klux Klan said to be involved in the killings.

ATTORNEY GENERAL RICHMOND FLOWERS OF ALABAMA: When such an order as this moves in and takes over the police power, you are completely at their mercy, *and their atrocities and their violence* can be visited on anybody that disagrees with them in any given situation.

KURALT: *What started as a joke a hundred years ago when a group of men donned bedsheets for a romp has over the years attracted to it persons charged with acts of harassment, intimidation and violence throughout the South.* Even though the nation has been outraged for many years, the Ku Klux Klan persists with its bizarre ritual and trappings. But a hundred years is a long time for a joke.

ANNOUNCER: CBS REPORTS presents "The Ku Klux Klan—The Invisible Empire." Here is CBS NEWS Correspondent Charles Kuralt.

KURALT: Good evening. The Ku Klux Klan is a secret organization which, for one hundred years, has been allowed to exist in this country. Virtually every president of the United States in the past century has said *the Klan has little regard for constituted authority. President Johnson, following the murder of Mrs. Liuzzo in Alabama, defined the Ku Klux Klan, as a "hooded society of bigots"* and warned Klansmen to get out of the Klan and return to a decent society before it is too late.

After the President's warning, the House Un-American Activities Committee started a full-scale investigation of the Klan and open hearings are scheduled for next month. The hearings will present witnesses—not only Klansmen but also victims of Klan activity. However, the Committee will not attempt to show the Klan in action. For the next hour, we will take a close look at the Ku Klux Klan from the inside out—examine its leadership, its ritual, its secret initiation, *its record of violence.* First, let us look at Klansmen without their robes.

It is Sunday, the morning after a Ku Klux Klan meeting in Durham, North Carolina. These men are members of the United Klans of America, Knights of the Ku Klux Klan, one of the most exclusive organizations in America.

It excludes many Protestants, all Roman Catholics, Jews, Negroes, Spanish Americans, Puerto Ricans and anyone else who, according to the Ku Klux Klan, is not 100 per cent pure American.

J. ROBERT JONES: I don't hate niggers, man. I don't—I don't—I don't associate with niggers. But on the other hand, I don't associate with common white trash or Jews or Catholics if I can help it.

KURALT: This is the Grand Dragon of the North Carolina realm of the United Klans, J. Robert Jones. Former sailor, bricklayer, lightning-rod salesman, he now reportedly rules over more than 50 Klaverns or chapters and their 7,000 dues-paying members.

JONES: I think the nigger has rights in this country. He should have equal rights, but separate rights. It's worked for a hundred years in the South and I think it will work now. But if you was the nicest fellow in the world and Lyndon Johnson said I had to associate with you every day, I'd tell Lyndon Johnson to go straight to hell because I would not associate with you.

KURALT: This is the Grand Klonsel, the late Matt Murphy, who until his recent death was chief legal counsel of the United Klans. His favorite targets were the Negroes, the Jews, the Federal Reserve System and international bankers.

MURPHY: I had made speeches before the United Klans of America and they were the only organization that ever went on record, after I had talked for two solid hours, *on the viciousness of the Federal Reserve Corporation and how it has bilked the taxpayers and the American citizens out of all their money* and that Great Britain has removed the bank from the international bankers and their bank is back under the Crown.

KURALT: This is a Night-hawk of the United Klans in North Carolina. A Night-hawk is responsible for the security of a Klavern.

REPORTER: Why did you join the Klan?

NIGHT-HAWK: Well, I've got a wife, five kids, and I think that's enough reason. I want them to be—have a country to raise, be raised up in like I was. I wasn't forced to go to school with niggers. I wasn't forced to eat with them. And I want them to have at least the right that I had.

KURALT: This is Mr. Outlaw. Wherever Jones goes, Mr. Outlaw, the Grand Klexter or guard, is at his side. In the group are *the three defendants indicted for the killing of Mrs. Liuzzo: Eugene Thomas, William Eaton, and Collie Leroy Wilkins.* These men had little to say. They preferred listening to their counsel, Matt Murphy, Jr.

MURPHY: *I read in my history books that the Negro man, the Negro race was an inferior race.* And that was the history that was taught me when I was in school. And that hasn't been too long ago.

JONES: *They always have been. They always will be.*

REPORTER: *Well, where do you think the money is coming from behind the civil rights movement?*

JONES: *From the Communist party. From the Zionist, Christ-killing Jews. And I say Christ-killing Jews because they have not been affluent since they—since they crucified Christ and their relatives can be traced back to the ones that's running in the streets today.*

REPORTER: What about the role of the Catholics in this, Mr. Jones?

JONES: *The reason the Catholic cannot get in this organization, his first allegiance is not to the United States of*

America, his first allegiance is to the Pope. They believe that the Church should rule the government with the Pope at the head. And if they're right, there's a bunch of people in this country who are wrong.

Let me say this. We have never had a drop of blood spilled between a white man and a black one in any town in North Carolina that we have the Klan organized. And we're doing our best to keep down trouble. But my people are—everybody in this country is organized with the exception of the white Protestant gentile. Your niggers have your Knights—your NAACP and CORE, along with your sorry white trash. You've got B'nai B'rith for your Jewish people. Your Knights of Columbus, which is a secret fraternal order, as they say, and nobody's ever talked about investigating that, which they should in here. But the white Protestant gentile, the only hope and the only salvation that they have left in this United States today, is the United Klans of America, Incorporated. We've saved the South twice—or the Klan has—and it looks like we're going to just have to do it again.

KURALT: One important Ku Klux Klan official was not at this meeting, the Klan Kludd or chaplain. But there was a Kludd in action the night before.

ROY WOODLE: You got a bunch of people standing right over here with their cameras and their news things. Half of them ain't got enough backbone to get them a job and go to work, but there's might be some good ones in the crowd. I want to tell you fellers—I, I'm just telling you, you fellows right over here—they'll print half of the story. They ain't got enough backbone to tell the truth. So anybody that lies with the devil, you're going to die and go to hell without God. If all you F.B.I. agents want to check the Klan and investigate them, I live on 209 Mendota Avenue, Lexington, North Carolina, and my name is Roy Woodle and I'm not ashamed to be a Klansman. Amen.

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KURALT: *This is the Klan Kludd in action, the preacher, evangelist, the hell-fire speaker, the rabble-rouser. He entertains with a mixture of comedy and Christianity, but above all, he preaches racial hatred.*

WOODLE: Now do you think the children is brought up to mix the black and white together? Do you know your horse won't mix with your cow, your dog won't mix with your hog? And you tell me white people has got a mind and can't think no clearer than that? Listen, friend, we need to turn to God. We need to wake up with God. We had forefathers died to give us freedom. Our forefathers walked barefooted in the snow and fought and died to give us freedom. *And now here we sit back because we got a dictator in the White House a-dictating* and you sending your money down now to pay it and ain't willing to stand up and be counted like a man or a woman. It takes a man to stand and be a man. *Anybody can go down to niggertown and commit adultery with a nigger,* but it takes a Christian, a man to stand for God.

Let me call you farmers to attention to a few things. You've raised hogs and you know when those hogs has a gang of little pigs, she'll try to protect them. You'll know the dog. When they have a gang of pups, they'll try to protect them. And you tell me you got a gang of white children running around in your yard and you're going to stand by and see them sold out to a bunch of niggers. God help you to wake up and try to do what God will have you do. Protect your own. Act like a decent person. And then if you don't want to do that, don't be a half-hazard hypocrite, don't be one-sided, go into niggertown and forget about it.

KURALT: The Klan was born a hundred years ago in Pulaski, Tennessee, as a six-member social club. But six years later, the Klan had a half a million members and the

burning cross, the Klan trademark, become a symbol of the violence it used to keep the newly freed Negroes in their place.

In 1915, D. W. Griffith produced and directed what has been called the first great feature-length motion picture, "The Birth of a Nation," whose subject was the Ku Klux Klan. Today this film, made 50 years ago, is still shown to Klansmen as the classic example of what other generations of Southerners did to protect white supremacy. These are some scenes from "The Birth of a Nation."

A chance witnessing of two white children under a bedsheet scaring a group of Negro children is depicted as the birth of the idea for the Klan. The idea is successful. Robed and masked Klansmen are able to frighten the Negroes. In a fight, the Negro sought for scaring a white girl and causing her to jump from a cliff to her death kills a white man. Captured, the killer is taken into the woods and put on trial. The Klan passes judgment. The culprit is killed and his body deposited at the door of the Lieutenant Governor.

In the same year "The Birth of a Nation" was first released, a new leader rose to head the Klan. William Joseph Simmons, one-time salesman of ladies' garters, in this rare newsreel film leads his followers up Stone Mountain in Georgia for the first initiation ceremony of the reincarnated Klan. Simmons added something new to the Klan uniform —a stylized face mask, which he alone could wear. He also insisted the Klan operate in total secrecy. The Klan's sinister power grew as new recruits joined, some through coercion, and its clandestine activities increased. In the first fourteen months after World War I, seventy Negroes were lynched, fourteen burned.

In 1922, Imperial Wizard Simmons could not overcome intra-Klan difficulties and was replaced by a dentist from

Dallas, Dr. Hiram Evans, who inherited a depleted treasury from Simmons as well as his title of Imperial Wizard. In 1923, Evans established headquarters in Washington to be closer to Congress, the Klan's next target.

The Klan was so powerful in Oregon in 1923 that it was able to elect the President of the State Senate and the Speaker of the House. In Ohio, Klan-supported candidates became mayors of Toledo, Akron, Columbus, and other cities. At the National Democratic convention in New York in 1924, it is estimated that at least 350 delegates were Klansmen and they were responsible for the defeat of Governor Alfred Smith as the Democratic nominee.

By 1925 the Ku Klux Klan was big business. Almost six million Americans now belonged to the Klan and the organization was grossing $75 million a year. Some 40,000 Klansmen and Klanswomen crowded into Washington on August 8, 1925 to parade down Pennsylvania Avenue. To help the Klan coffers, a flag was used to catch money thrown in by spectators.

In the 1920's, the Imperial Wizard of Indiana, David C. Stephenson, was indicted on charges of assault and battery, rape, mayhem, kidnapping and murder, and found guilty. This scandal caused a sharp drop in Klan membership.

In 1940 there was a mild flirtation between the German-American Bund, the believers in the master race, and the Ku Klux Klan, the believers in the supremacy of the white race. They joined up in a rally at Camp Nordland, New Jersey. *Twenty-five years later there is evidence that Klan-Nazi friendship is being revived. This year in Houston, Te[redacted], Jerald Walraven, claiming membership in the United Klans, Knights of the Ku Klux Klan, was interviewed by Radio Station KTRH and was paid by check for his appearance. When the cancelled check was returned to the radio*

station, it had been endorsed by Lincoln Rockwell, head of the American Nazi Party, with a swastika stamped beneath his signature.

In 1944 Imperial Wizard Dr. James H. Colescott received a bill from the U. S. Collector of Internal Revenue for $685,000 for the Klan's back taxes. Unable to pay, Dr. Colescott disbanded the Klan. But four years later, Colescott's former partner, Dr. Samuel Green, reactivated the Klan and many new converts were initiated into Klandom, motivated by a desire to keep the Negro in his place. At a rally in Macon, Georgia, Imperial Wizard Green defended the new Klan.

GREEN: We don't hate the Negro. God made him black and He made us white and you will find this laid out in the Eleventh Chapter of Genesis, in which He segregated the races. And we, knowing that for 5,000 years the white man has been the supreme race, we, the Knights of the Ku Klux Klan, intend to keep it the white race.

KURALT: Today the organization differs from the past in that Klansmen are willing to appear in their robes and hoods in daylight. With the advent of the civil rights struggle, the Klan has become more militant. Some groups have para-military units, such as this one in North Carolina. Grand Dragon Jones' security guards are trained to take care of anything that might happen at Klan rallies.

The Klan also sponsors softball teams. Since softball can't be played in robes, KKK letters appear on the uniform to remind the spectators that this team is made up of 100 per cent pure white American Protestant ball players.

Sometimes Klansmen engage in more bizarre sport. *The letters KKK were carved with a pen knife on the chest and stomach of this man in Houston, Texas after he had been hanged by his knees from an oak tree and flogged with a chain.*

The Attorney General of Alabama, Richmond Flowers, who is currently investigating the Ku Klux Klan in his state, told us:

FLOWERS: *The Klan to me is a group primarily of thugs that would use the civil rights issue to foster an organization or a Klan, as they are, and will take the law into their own hands. They have become more or less—more or less their own police power. They are a police group within themselves, dedicated to defiance of law and violence. They are, as I have expressed it before, they are a hooded bunch of killers and night riders and floggers that this nation and this state has no use for whatsoever.*

KURALT: The strength of the Ku Klux Klan is difficult to estimate. Among its many secrets is the actual membership total. Students of Klan affairs say there are at least 30,000 to 50,000 active members. But there are probably as many as a million or more Americans who are strongly sympathetic to the aims of the Klan and who, if pushed to a decision, would join the Klan. When a 100 per cent pure white American citizen applies for membership, his application is carefully checked. If accepted, he can then leave what the Klan calls the "alien world" and become a member of The Invisible Empire.

For the first time in Klan history, CBS NEWS cameras filmed part of a secret initiation ceremony at a Klavern in Georgia. Filming had to be done with available light and the only parts of the ritual we could not film were the secret handshake, the password by which Klansmen identify themselves to each other, and the secret oath of allegiance to the Imperial Authority of the Klan. This is the ceremony we filmed.

KLANSMEN: For my country and my Klan, our fellow Klansmen and our home, I pledge allegiance to the flag of

the United States of America and to the Republic for which it stands, one nation, under God, indivisible, with liberty and justice for all.

KURALT: Five initiates appeared before an Exalted Cyclops, a Klokard, Kludd, and Kligrapp, corresponding to a president, lecturer, chaplain, and secretary. The men were presented by the Klokard and they had been checked out by the Klokann or investigating committee.

On a makeshift altar before an electrified cross are placed a sword, representing ancestral courage, and a flag, the emblem of pure patriotism. An open Bible is laid on the flag. A glass of water, which is used to consecrate the initiates, completes the symbolic array. A Klarogo or inner guard sits at the door. On the other side is a Klexter or outer guard. The Klokard and two assistants report to the Exalted Cyclops.

KLOKARD: Your Excellency, sir, five men in waiting have equally and duly qualified in our Klavern during and through the mysticating quest for citizenship in The Invisible Empire, United Klans, Knights of the Ku Klux Klan.

CYCLOPS: Faithful Klokard, you and your assistants will resume your stations.

KLOKARD: We have, your honor. Follow me and be proven.

KLAROGO: Forward march. Halt. You will stand in silence and take heed to a Klansman's prayer.

KLUDD: God, give us Men!....

Men who can stand before a demagogue
And damn his treacherous flattery....
Tall men, sun-crowned, who live above the fog
In public duty and in private thinking;

For while the rabble, with their thumb-worn creeds,
Their large professions and their little deeds,
Mingle in selfish strife, lo! Freedom weeps,
Wrong rules the land and waiting justice sleeps.
God, give us Men!

NIGHT-HAWK: Right face. Halt. Left face. Left face.

KURALT: This is the "eyes of scrutiny" part of the initiation ceremony. Klan members pass by the initiates for one last searching look.

CYCLOPS: You may pass on.

NIGHT-HAWK: Right face. Forward march.

KURALT: In this room the initiates swear allegiance to the Klan above all things. The secrecy and ritual of these meetings, which seem almost laughable to the outsider, have a grimly serious purpose. Because of its secrecy, the Klan can hold sway over a community. When men are initiated into Klandom, in rituals such as this one, their neighbors will not know they have become Klansmen. If some of the initiates are policemen or sheriffs' deputies, their fellow officers will not know. If they are jurors, their fellow jurors will not know. Under the cloak of this secrecy, the Klan can take over positions of influence and power.

KLUDD: I beseech you therefore, brethren, by the mercies of God that you present your body as a living sacrifice. Be ye transformed by the renewing of your mind that you may prove what is that good and acceptable in perfect will of God. We recognize our relations to the Government of the United States of America, the supremacy of its Constitution, the Union of States thereon, and the Constitutional laws thereof. And we shall ever be true and faithfully maintain

white supremacy and will strenuously oppose any compromise thereof in any and all things. Are you a native-born, white, gentile, American citizen?

INITIATES: Yes.

KLUDD: Do you believe in the tenets of the Christian religion?

INITIATES: Yes.

KLUDD: Do you esteem the United States of America and its institutions above any other government, civil, political or ecclesiastical in the whole world?

INITIATES: Yes.

CYCLOPS: Kneel on your right knee. Klansmen, one and all, let us pray. Sirs, you may now rise. Sirs, you are no longer aliens or strangers among us, but are citizens with us. And assuming that you haven't foresworn falsely or deceitfully in assuming your oath and now on behalf of all Klansmen assembled, welcome you to citizenship in The Invisible Empire, Knights of the Ku Klux Klan.

KURALT: The five new Klansmen are no longer part of the "alien world." Now they are members of The Invisible Empire, entitled to wear the robe and the hood, the proud possessors of the secret handshake and the secret password. And now they can attend Klavern meetings and Klan rallies, such as this one in Dunn, North Carolina.

A Klan rally has many elements of a carnival. It's an outing for the family. Children start attending these outdoor meetings at an early age. Robes for the youngsters are made by mothers and follow the pattern of adult robes. Rallies always have entertainers and their material is Klan-tailored for the audience. This entertainer recites a poem:

KLANSWOMAN: "The Saddest Story Ever Told."

When a white girl marries a Negro,
Her sun of light goes down
And glaring spots of sin
Appear on her wedding gown.

And white and black men stand aghast
While viewing this strange role
And mutter, "They will wreck themselves
And damn each other's soul."

Three days and nights she felt black lips
Pressed smug against her own
And on the fourth her troubled soul
Let out a frightened groan.

And so I stagger through my days
Far from God's love and grace,
Till now I know no black man lives
Can take a white man's place.

Thank you.

KURALT: The featured speaker is usually a well-known personality. At this rally it was the late Matt Murphy, Jr., Imperial Klonsel or chief legal counsel of the United Klans.

MURPHY: And I'll tell you this, and go to your Congressman, ask him what to do, and tell him what to do because they're about to pass a bill up there that if you strike a civil rights worker, it's a federal offense and they'll haul you before a federal court and take you to the most favorable county they can find and cut your head off if they can. And when I say cut your head off, I mean they'll send you to the federal penitentiary. That's the way they're doing it. That's the way they call the shots. So for God's sake, get

your Congressman and if he doesn't do it, elect somebody that will fight such a bill as that.

KURALT: As extra added attraction, Matt Murphy introduced *the three men indicted for the murder of civil rights worker, Mrs. Viola Liuzzo.*

MURPHY: *Mr. W. O. Eaton. Mr. Eugene Thomas. And the boy who stood under the battle guns, Collie Leroy Wilkins.*

KURALT: And befitting the occasion of a Ku Klux Klan rally, the three men were beseiged by autograph hunters and they willingly obliged.

Klan members accused of crimes must be defended. Their Klonsels or attorneys must be paid. In addition, money is required for operating expenses and leaders' salaries, which run as high as $1,500 a month. The Invisible Empire needs a treasury. But where the money comes from and how much is a secret. What is known is that initiation fees are between $10 and $25 and yearly dues for assessments range from $3 to $15. A conservative estimate is that the Klan is a million-dollar-a-year enterprise. The money comes from initiation fees, dues, robe and hood sales, individual contributions, and from what can be raised by a Klan Kludd at a rally.

KLUDD: There might be a businessman that's prosperous and you can afford to give a thousand. You can afford to pay one of the men's salary. There might be a businessman. There is. There may be some company that can write a check for one man's year's salary to do nothing but set up units throughout North Carolina. Whatever you have. $10, $5, walk down with it. Will you do that? Is there others? You know, we ought to be able tonight, we ought tonight to be able to come way on up the ladder. We're going to

count this just as soon as I leave the platform and let you know how much there is.

KURALT: The men and women in robes receive torches and the parade around the Kuklos or circle begins. What you are watching—700 robed and hooded men marching around a burning cross—took place in the United States in 1965.

ANNOUNCER: CBS REPORTS: "The Ku Klux Klan—The Invisible Empire" will continue in a moment.

(ANNOUNCEMENT)

ANNOUNCER: CBS REPORTS: "The Ku Klux Klan—The Invisible Empire" continues.

KURALT: Klan leaders are sensitive about the reputation the Klan has for intimidation and violence. In an attempt to erase this image, they have adopted a new policy which, in effect, says: "Look at us. We are a fraternal organization. We have nothing to hide." Imperial Wizards and Grand Dragons no longer avoid the press. Klan leaders sport crew cuts, button-down collars and well-tailored suits. The most publicized and best-organized Klan leader is Imperial Wizard Robert Shelton of the United Klans, Knights of the KKK. Shelton spends much of his time in his Tuscaloosa, Alabama office, constantly listening to tape recordings of Martin Luther King, Jr. while he examines pictures of civil rights demonstrators. Those he can identify are circled and filed. Shelton explains why.

ROBERT SHELTON: We have a division in our organization called the K.B.I., the Klan Bureau of Investigation. And I might add, it is pretty effective. We are able to uncover a lot of evidence that other departments might miss.

KURALT: It is estimated that Imperial Wizard Shelton is the highest-paid officer in Klandom. He has a private airplane, a limousine, and he travels constantly. As Imperial Wizard, Shelton has several Grand Dragons or State Governors under his command: Grand Dragon of the Georgia realm, Calvin Craig; Grand Dragon of South Carolina, Robert Scoggins; Grand Dragon of Mississippi, E. L. McDaniel; Florida's Grand Dragon, Don Cothran; Grand Dragon of Tennessee, Raymond Anderson.

Klan leaders constantly preach race hatred. Every Klan speaker warns against mongrelization of the races. And hearing this theme of white supremacy repeated over and over again, *some Klan members come to believe their status is threatened and commit acts of violence. Immediately Klan officials deny responsibility for the criminal acts of their members. In rare cases in which Klansmen are arrested, the leaders even deny these men are members of their group.*

Yet it is known that there are approximately 5,000 hard-core members of the Klan who are obsessed and fanatical—fanatical enough to set fires, bomb, dynamite, and even kill. The question is : How can Klan leaders avoid responsibility for violence when they themselves repeatedly whip up their members to action? Go to any Klan meeting, this is what you'll hear:

KLANSMAN: White man, is this your country or does it belong to the niggers?

VOICE: White man.

JAMES VENABLE: If you want your daughter, your son to marry a nigger, hold up your hand and let me look you in the eyes, if you're a white man or a white woman in this great nation there.

ROBERT CREEL: "We're on the move." That's what the Negroes are hollering. "We're on the move. We're on the

go. We're going to run the white people down. We're going to kick them in the teeth. We going to take our place in society." I got news for nigger, for you niggers. We're on the move too. I don't believe in segregation. I believe in slavery.

KURALT: *The Klan says it does not advocate intimidation, harassment or violence, that it is a peaceful organization Let us take a look at some proven Klan activities.*

In the small community of Gray, Georgia, the only movie theater in town permitted Negroes to sit in the balcony. The Klan decided this was not a healthy thing for the white people and every Friday night, 50 carloads of robed Klansmen circled the theater. Today the movie house in Gray Georgia is closed, a victory for the Klan.

Further examples of Klan intimidation were uncovered in an injunction lawsuit in the Fifth Circuit Court of Appeals in New Orleans. The hearings revealed that in Bogalusa, Louisiana, sometimes called Klantown, U. S. A., some of the city's estimated 1,000 Klan members were auxiliary policemen. The City Attorney, who is responsible for prosecuting charges against Klansmen arrested for violence against civil rights workers, was himself identified as a Klansman.

The powerful Bogalusa Klan moved this year against Radio Station WBOX, whose owner was one of a group which invited former Arkansas Congressman Brooks Hays to make a speech in Bogalusa on race relations. Klansmen made hundreds of anonymous phone calls to the station's sponsors. The effect was immediate; 75 per cent of the commercials were cancelled. WBOX is still broadcasting, but at a loss.

Although the Klan says it has respect for law and order, there are records of countless crimes which some Klansmen performed for reasons they deemed proper.

Judge Daniel Duke, who has fought the Klan for 25 years in Georgia, tells how the Klan administered its own kind of justice.

DANIEL DUKE: *They'd have a— the Klokann Committee, the committee that administered the floggings. One would get on one side of this man, who was doubled up with his wrist handcuffed to his ankles, who had been taken from his home, he thought by a legal warrant, and who had, unknown to him, been reported by someone to be a labor organizer. And they equated that to communism. And then they equated that to race-mixing. And they would usually equate that to say some Jewish person was back of it and a multiplicity of things—anything that appealed to hate, prejudice. They'd take this man and they would beat him unmercifully.*

KURALT: *The Ku Klux Klan does not stop at floggings. Eight years ago in Birmingham, Alabama, a group of Klansmen committed the most heinous crime short of murder. As a warning to civil rights leaders, they abducted this man and castrated him.*

MAN: *They hit me in the back of the head and told me to lay down and they all grabbed me and stretched me out. One stood on this arm and one stood on this one and one caught my leg and spread it apart. Then he got help from the other one and they spread my leg apart. The boss ordered him to "do your work" and they went to cutting on me. When they got through cutting me, they put turpentine on me and said I wouldn't holler—put turpentine on to make it hurt more. I don't believe they're human.*

KURALT: *But not only individuals suffer at the hands of the Klan. Sometimes whole cities are victims. In one large city, there is evidence that Klan-inspired violence touched off one of the most vicious racial riots in recent history.*

The place was St. Augustine, Florida. This Klansman was primarily responsible for what happened. Reverend Connie Lynch is probably the most effective rabble-rouser and preacher of bigotry the Klan has to offer.

LYNCH: *Most people would kill you if you put a Jersey bull in among their white-faced Herefords. They'd shoot you. But to tell me that I don't even have the right to fight to protect the white race . . . let these black bucks come in. They said it was going to be settled in the bedroom. Well, I got some news for them. There may be some bedroom cases all right. But when the smoke clears away, there won't be no bedroom cases.*

KURALT: *Little Rock, Oxford, Birmingham, Albany, Georgia, Bogalusa, Louisiana—Connie Lynch was there. And when racial violence was predicted for St. Augustine, Florida, Connie Lynch went there too.* Negroes were trying to integrate the bathing beaches and the Florida Advisory Committee to the U. S. Civil Rights Commission warned that the city was becoming a racial "super bomb" with a "short fuse."

WOMAN: When the police stand up on the corners and hit the white fellers in the stomach with the blackjacks for standing on the corners and the white people going to march through and take it.

KURALT: The tempo of violence increased rapidly in St. Augustine. The Klan paraded in the streets, unmindful of the rain.

LYNCH: And I'll say this to the stooges that want to take this back to the enemy camp, to the niggers and all their cohorts, that we white people are going to rise up a hundred and forty million strong and . . .

KURALT: *On the night of June 25, 1964, the fuse burned down and the racial bomb exploded. St. Augustine was the scene of a frightening riot. Scores of people were injured, 19 hospitalized. Connie Lynch had done his work.*

LYNCH: *I spoke for the white people. The white people rallied behind it and we kicked the living hell out of the niggers, sent the out-of-town niggers to the hospital and out of the state back to their own home towns where they ought to have been, and the niggers in St. Augustine got quiet and went back over to niggertown where they belong.*

KURALT: These examples of Ku Klux Klan activity are not unusual. For the past 100 years, The Invisible Empire, this self-proclaimed second national government, has reserved to itself police authority and the right to correct what it considers wrong. Although some Klansmen have been apprehended and tried for their crimes, *the fact remains that the perpetrators of more than 225 bombings and 1,000 acts of racial violence, reprisal and intimidation in the last ten years have not been arrested. The problem is that law enforcement itself is often in the hands of authorities who either belong to or sympathize with the Ku Klux Klan.* The publisher of *The Atlanta Constitution*, Ralph McGill, explains why citizens are powerless to protest in such situations.

MCGILL: In the small community you too often find that the sheriff is a member or that the deputies are members. *And the poor white man, or more particularly the poor Negro in a small community, he well knows that he has no protection at all. The law isn't going to help him because the law is, more often than not, in the Klan or sympathetic with it in the small Southern community.*

KURALT: The Grand Dragon of Georgia, Calvin Craig, confirmed that law enforcement officers are Klansmen.

CRAIG: We have policemen. We have sheriffs. We have farmers. We have mechanics. And myself, I'm an operating engineer.

KURALT: *One law enforcement officer sympathetic to the Klan, Sheriff Lawrence Rainey of Neshoba County, Mississippi, was charged in the death of civil rights workers Schwerner, Goodman and Chaney.* Recently Sheriff Rainey was introduced at a Klan rally by the Grand Dragon of Mississippi, E. L. McDaniel, and offered a testimonial to members of the Klan.

MCDANIEL: I would like at this time to call Sheriff Lawrence A. Rainey from Neshoba County to the platform for a statement. Are you proud he's here?

RAINEY: Thank you.

VOICE: Where's your Red Man?

RAINEY: It's in the car. Can't do without that. No, I was just down here. I've been accused by the F.B.I., by the Klan and everything and so I come down today to see the head man and investigate it and see what there was to it. And I found it so far to be mighty good. They just done a lot of lying about it. I've met some of the best fellows I think there are in Alabama and Mississippi and other places. And I've had to lay some deputies out that's been investigating it and they reported to me a while ago, they'd met some fine people and thought it was a mighty good organization. Thank you.

MCDANIEL: Let's give him a hand if you're glad he got on this platform. A true, great, white American.

KURALT: The Klan is not a single, strongly organized group. It is composed of splinter groups fighting each other for

new members and new territory. On Memorial Day weekend, Robert Shelton's chief rival, James Venable, head of the National Knights of the KKK, took his Klan north to a site 25 miles from Cincinnati, Ohio. Both Venable and Shelton believe the whites in the North, worried about Negro civil rights demands in their own communities, are ready to embrace the Klan. This was the first open Klan rally in Ohio in more than 30 years. The fact that the Klan is getting bolder was demonstrated by the site which was selected, right alongside superhighway 75. Klan robes, many of which had been stored away for years, were put out for an airing. Since the building of a cross for the Klan ritual requires skill, out-of-staters volunteered to hammer the cross pieces, wrap the burlap carefully, and then soak their handiwork with a mixture of gasoline and motor oil—a half gallon of gasoline and five pounds of oil for every foot of the cross.

MEN: This side. Look out. All right. Hold it. Hey, fellow, get off those wires.

KURALT: The Klan added a new touch to attract crowds, a skydiving show with parachute jumpers releasing Klan flags and then landing on Klan-blessed land.

The northernmost penetration of the Klan took place last month near Cleveland, Ohio. All cars headed for the rally were searched for weapons and police confiscated high-powered rifles, shotguns, and pistols. There were the usual preparations, including the raising of the cross. At a nearby reastaurant, men lined up to get applications for membership in Imperial Wizard Venable's Knights of the Ku Klux Klan. That evening 25 men and women, kept at a safe distance, picketed the meeting. The burning of the cross was the high point of this rally, only 21 miles from Cleveland.

Does The Invisible Empire have a right to continue its activities either in the North or the South? In our democ-

racy freedom of speech must be accorded this organization. Klansmen have a right to meet and wear uniforms. If the Klan is a fraternal order, it should enjoy the privileges of other orders. But the truth is that among all such organizations, *only the Klan has a history of violence.*

Lawmakers have not ignored the Klan. 22 states have passed laws prohibiting the wearing of masks in public and 52 southern communities have outlawed masks and cross burnings. But even these laws have been ineffective. Klansmen can still legally wear masks and burn crosses on private property. *They still intimidate and harass citizens.*

Now the office of the Attorney General is working on new anti-Klan legislation for submission to Congress. Attorney General Katzenbach was asked what form this legislation might take.

KATZENBACH: Well, I think it could take a number of forms. One would be to follow the analogy with respect to the Communist party and to seek full disclosure of their membership and a listing of the Klan and its members and its officers as a sort of glare of publicity. Another approach, perhaps a better approach, would be to follow the pattern of the existing laws, but to expand their scope of federal jurisdiction under them and to increase the penalties under them so that the federal government could get a more deep involvement.

KURALT: We've put up with the Klan for a hundred years in this country. How long is it going to take for us to see the end of the Klan?

KATZENBACH: I don't know when we'll see the end of the Klan. I think the end of the Klan as any kind of an effective organization of any sort at all is within sight. I doubt that the Klan is going to be a very effective force anywheres ten years from now.

KURALT: Today still another investigation of the Klan is being conducted in Washington by the House Un-American Activities Committee. The Committee has issued more than 200 subpoenas. The Chairman, Representative Edwin Willis of Louisiana:

WILLIS: *It is certainly a clear and present danger to communities and to areas within which they operate. There's no question about it. It's perilous. It's terroristic.* Now, I wouldn't want to dignify them into believing that they're a clear and present danger to our Government of the United States. I hope we can extinguish the flame before the fire reaches such proportions.

KURALT: One of the subcommittee members, Representative Charles Weltner of Georgia, was asked how the Klan could be curbed.

WELTNER: One of the reasons it's difficult to convict a Klansman is because nobody knows who else is a Klansman. Nobody knows whether jurors are Klansmen. *They're under mandate to lie about their Klan activity when they're examined. That's a mandate higher than the oath that is required of all jurors. One of the reasons it's hard to convict Klansmen is because of the secrecy, the terror, the unknown quantity, the mystery of the Klan.* Now when we strip this organization of those elements, then the Klan becomes a group of small, willful men who have devoted their activities to hatred and they are simply not going to be accepted for what they really are when the people know what they really are.

WILLIS: I predict that there's going to be weeping and wailing and gnashing of teeth. And all the protestations about how great and how dedicated the Klansmen are and how attached they are to Christianity—I'm afraid a few

little balloons are going to be bursted before this thing is over.

KURALT: The impending Committee hearings will focus the national spotlight on the Ku Klux Klan and it is possible that part of The Invisible Empire may become visible. Defections have been noted. Earlier in this program we showed Reverend Roy Woodle, a Klan Kludd, in action. A few days ago, Woodle quit the United Klans Incorporated. Last week at his home near Lexington, North Carolina, we asked him why.

WOODLE: Well, if people would just check the record and see just now what, who is leading the Klan and what are they and what do they stand for—that would be a logical question. So take any individual, what if he be in the Klan or out, check the leadership. Say, for example, we have people was painter-contractors. Far as I know, failures. We have people was insurance agencies. Far as I know, failures. We have people was concrete business. Far as I know, failures. And such as that—just failed out and flunked out. Come promote leadership and just lost out everything they had and then, well, when they couldn't find nothing else to do, the fellows said they made them a Klan leader.

Take, for instance, you make a man a security guard and pin a little old bar or something on him, he thinks he's a big wheel and a deal and, therefore, he'll follow it till he spend all of his money every weekend for gas; run up and down the road right—just that he can get out there and strut with them bars on, think he's a big shot of some kind. If he go back home and check his home, no doubt he wouldn't have no decent food in his house to eat.

KURALT: Is there immorality in the Klan, un-Christian kind of activity?

WOODLE: Now if a man will go to a Klan rally professing to be a preacher—let me put emphasis on that, professing to be a preacher—gets up and bows his head and says he's praying to the Lord for people to help give and then plant a man out in the crowd with a $100 bill, one with a $50, and say: "Now who will give a hundred dollars?" and ask it, then that man will come forth and try to bewitch somebody else to come. Now that's deceiving the people.

KURALT: Do some of the Klan leaders misuse the people's money?

WOODLE: If he's going to promote leadership, why ride around in a big car, telephone in it, jump out at rallies, which you fellows know does—everybody does—and gets up on the platform, makes his speech, holds his rally, they take up the money, then they're off. And they have no more leadership from there. The next year they'll come back with the same thing: another rally, big Cadillac, a big speech and away again.

KURALT: *At every Klan meeting, Reverend Woodle, they go around and collect money. What happens to that money? Where does it go?*

WOODLE: *Well, far as we know, it all finds its way in the pockets of the leaders.* Now if you know where any else, but I don't myself as an individual. I just couldn't tell you. Now we know that they do take up money every rally. Now we know that. The news knows it. Everybody there knows it. They pass the buckets around and they do take up money. But far as we know, that's the end of it. We don't have no record or nothing else, as far as I know now. Somebody else may know something I don't know. But all we know is people rides around, lives in their motels, drives their Cadillacs, eats their rib-eye steaks, and laughs at the poor people as they go by.

KURALT: When the House Un-American Activities Committee begins its hearings, the confrontation between Committee members and Klan leaders and followers should provide interesting answers. If an Imperial Wizard is asked at these hearings to name members of his Klan group who may be judges, police chiefs and legislators, what will happen? *Will he do so or will he choose to plead the Fifth Amendment? What will happen when a Klan Kludd is asked where the money he collects at a rally ends up? What will the array of Kleagles and Kladds and Kludds say when they are asked about the reports of secret Klan bank accounts in the names of Fish and Game Clubs in the South? And how does a check to a Klansman end up in the accounts of the Nazi party? What will happen when a Grand Dragon is asked to give the names of Klansmen who may have participated in acts of racial violence? What will the traveling ministers of the Klan faith say if they are asked how race riots start? Will they plead the Fifth Amendment? And if certain sheriffs are asked under oath whether they are Klan members and whether they know the details of unpunished crimes, how will they answer?*

Those House Committee hearings on the Klan begin next month. The Attorney General's recommendations for new laws may be expected by the end of the year. Washington is moving against the Klan. But whatever happens to the Ku Klux Klan will not, finally, happen in Washington. It will happen in those small towns of the South whose natural spirit of generosity and justice have been damped and whose leaders have fallen silent. If the Klan prospers, it will draw its strength from such communities. If the Klan falls, it will be because one man, and then another in such places, have made up their own minds that a free society cannot coexist with an Invisible Empire.

CBS REPORTS,

"Biography of a Bookie Joint"

November 30, 1961

ANNOUNCER: The report which follows is a document of fact regarding crime. No actors or re-enactments are used.

CRONKITE: *The focus of our report is a key store in Boston, Massachusetts. Address: 364 Massachusetts Avenue.* Until recently, this was the busiest store in the neighborhood, perhaps one of the busiest key stores in the world, open for business six days a week; nine hours a day in the winter, twelve hours a day in the summer. During business hours, cars double parked in front, and in some days, more than one thousand customers entered this door. Many proceeded to a room in the rear of the store. *We followed with a concealed microphone and camera.*

FIRST MAN: *Give me number 6 in the fifth.*

SECOND MAN: *Number 1.*

CRONKITE: *The men behind the counter are called "bookies." They're taking off-track bets on horses and dog races, and selling chances on the numbers game—a form of lottery. What they are doing is illegal in every state of the Union—except Nevada.* They are among thousands of bookies engaged in a nationwide, multi-billion-dollar-a-year business. A business that has been called "The Treasure Chest of the Underworld."

How does orgahized gambling operate? How does this business continue despite laws against it? And *when the laws are not enforced by police officers, how does this affect the community and the nation?*

(ANNOUNCEMENT)

ANNOUNCER: CBS REPORTS: "Biography of a Bookie Joint."

CRONKITE: This is Walter Cronkite. Experts agree that organized gambling is the most lucrative, most corrupting and the most widely tolerated form of crime in the nation. This huge business pits the government of the underworld against the government of the people. The corner bookie, to be found in most American cities, is at the base of the problem. He is the so-called "little man," but he is the funnel through which billions of dollars a year flow into the underworld. It is our purpose tonight to examine the consequences of the nickels, the dimes and the dollars wagered with the corner bookie. He and his associates might operate out of a hotel room in New York, or a tavern in San Francisco, or as in the case of this report, a key store on Massachusetts Avenue.

Boston's Massachusetts Avenue is a main thoroughfare—six lanes wide. Here, it passes through Back Bay Boston, a predominantly white area, to the South End section, predominantly colored. The Swartz Key Shop is in Back Bay near the dividing line. Its customers come here from both neighborhoods. The dome of this Christian Science Church is the dominating landmark in the area. It is three blocks from the key shop. One block away is the Boston Sports Arena. Boston's Symphony Hall is two blocks away; and the nearest Precinct Police Station is a half a mile from the key shop. This report continues in the words of Producer-Reporter Jay McMullen.

MCMULLEN: We found that at least one lookout usually was posted near the front door of the key shop. Most of the time, he stayed inside keeping watch through the front window. Across the street, we found an apartment. Here we could watch the key store without being seen. We moved in our cameras at 11:00 P.M. on the night of May

31st, 1961. By early morning, our cameras began to observe the key store close up, but CBS REPORTS was not the first to investigate the activity here.

CRONKITE: In 1951, the key store was brought to the attention of the New England Citizens Crime Commission. Dwight Strong, Executive Secretary of the Crime Commission, received the complaint.

STRONG: A former State official came to my office. He'd been in the key shop, had keys made, and suspected illegal gambling activity. I went there, went into the place, saw several customers at a counter toward the rear. Behind the counter were two men who were writing on 3 x 5 pads. The customers had slips and money in their hands. I could not see what were on these slips. They looked up and wondered what I wanted. I said, "I'd like some keys made." One of the men came and took my key, went to the key machine, and made the keys for me, and I left the shop at that time.

MCMULLEN: What happened after that?

STRONG: Well, we were unable to start a full-scale investigation for shortage of manpower. We did bring it to the attention of the Massachusetts State Special Crime Commission, which was created in 1953 by the State Legislature to investigate gambling activities throughout the state.

CRONKITE: *State Crime Commission agents investigated the key store—observed illegal gambling here and found evidence that this was more than a local operation.* Tom McArdle, former Chief Counsel of the Massachusetts State Crime Commission:

MCARDLE: We checked on the telephone toll calls of this establishment, and we found a great deal of inter-state telephone toll activity to various places in the country.

McMULLEN: What did that imply to you?

McARDLE: Well, we concluded that bets were being laid off.

McMULLEN: What do you mean by "laid off?"

McARDLE: Well, a lay off is a device whereby a bookie balances his book. If he has too much bet on a given horse, let us say, he doesn't want to carry the entire risk—he will call to some bookmaker elsewhere—very frequently outside of the Commonwealth, and is able to find one who will take part of the risk that he has on that particular horse.

CRONKITE: The State Crime Commission found that toll calls from Massachusetts bookies went out to more than fifty cities across the nation, including such major lay-off centers as Newport and Covington, Kentucky; and Chicago, Illinois. The calls went as far north as Montreal; as far south as New Orleans and Miami; as far west as Las Vegas and Los Angeles.

In August, 1961, testimony at McClellan Committee hearings on illegal gambling alleged that Boston itself is one of the major lay-off centers in the nation. This map, displayed at the hearings by the Internal Revenue Service, shows a network of major lay-off pipe lines throughout the country. The map does not include a maze of so-called minor connections between the gamblers. Even a small store may be part of a network. *Evidence that the key store was engaged in inter-state gambling activity had been found by the State Crime Commission.* Jay McMullen asked Tom McArdle what happened to this evidence.

McARDLE: When the Crime Commission was terminated, we turned over our files to the Criminal Information Bureau of the State Police. *I do know that the Massachusetts Police Chiefs' Association made a public statement some several*

months later, that the—all of the information that we had, had been examined by many of its members, and that they found nothing of interest to them as law enforcement officers.

McMULLEN: They said there was nothing of interest in the information you supplied?

McARDLE: In substance, that's what they said, yes.

CRONKITE: The State Crime Commission investigating organized gambling was terminated by the legislature in 1957. *At the key store, business continued. It is a violation of the City Ordinance to burn trash on the sidewalk, but here the smoke of burning betting slips remained a common sight—a beacon for betters.* In June, 1957, some of the betters turned out to be agents of the Internal Revenue Service. This is H. Alan Long, Director of Intelligence, Internal Revenue Service.

McMULLEN: Mr. Long, on June 21st, 1957, treasury agents raided the Swartz Key Shop in Boston, but no arrests were made. Why?

LONG: Because, at that time, the only individual we found taking bets there was a man who had a Federal Wagering Tax Stamp; therefore, there was no violation and no basis for an arrest.

McMULLEN: In other words, no Federal law prohibits off-track betting. Is that right?

LONG: That is correct. But the law does require an off-track bookie to buy a fifty dollar Wagering Tax Stamp and to file an excise tax return with which he pays a tax of ten per cent of his gross bets.

McMULLEN: Suppose he does all of that? Suppose he buys the wagering stamp, registers, pays his excise tax. Can this

be construed as a license to break the state anti-gambling laws?

LONG: No. Absolutely not.

MCMULLEN: Well, after a bookie registers, is this information available to the local police?

LONG: Yes. The copy of his application is public record in the District Director's office. The local police—the newspaper reporters—any one who is interested, can go there and look at it.

MCMULLEN: They can see that this bookie is registered and where he is operating—the address?

LONG: That's right.

MCMULLEN: Well, doesn't the law also require the registered bookie to display a gambling stamp on the premises where he operates, as further notification to the police and to the public that he's in business?

LONG: Yes, it does.

MCMULLEN: Why do you think that most bookies fail to register?

LONG: Probably because the law is self-defeating in the fact that when a bookie registers and announces that he is engaged in this business, and where he is engaged in it, he is openly inviting investigation and possible prosecution by the local police.

CRONKITE: *It was a matter of public record that one operator at the key store was a registered bookie. This man, carrying the trash can, had purchased a Federal Wagering Stamp. He could continue his activity as a bookie and could openly dump charred betting slips on the street without fear of Federal interference. He remained in business—and*

business at the key store continued for the next three years. In September, 1960, the State Police received a complaint about illegal gambling at the key store. This is Carl Larson, Executive Officer, Massachusetts State Police.

LARSON: *As a result of receiving this complaint, a survey was conducted at this location by State Police officers. Evidence of illegal gaming was observed, and as a result of this observation, a letter was sent by this Department to the Boston Police Commissioner, advising him of our findings.*

MCMULLEN: *Why did you pass on this information instead of taking direct action, yourselves, against the key shop?*

LARSON: *It has been our policy to forward information of this nature to the local Police Department, so that they may take action on these offenses.*

CRONKITE: *Boston Police Commissioner Leo Sullivan's reply to the State Police letter alleged that Abraham Swartz, owner of the key store, had been arrested by the Boston Police on July 7th, 1950, for promoting a lottery—that in Roxbury Court, on July 10th, 1950, Swartz paid a fifty-dollar fine, on that lottery charge. "Since that time, this location," said the Boston Police Commissioner, in his letter to the State Police, "has been under surveillance; search warrants have been obtained on several occasions, but no evidence of illegal gaming was found."*

In November, 1960, after receipt of the Boston Police Commissioner's letter, State Police conducted another investigation of the key store.

LARSON: *On November 18th, 1960, the State Police made another surveillance of illegal gambling at Swartz's Key Shop and evidence of gaming was again found. As a result of finding this evidence, another letter was forwarded to the Boston Police Commissioner.*

MCMULLEN: *Well now, this was the second complaint that you had sent to the Boston Police Commissioner regarding the key shop. What was the reply to this letter?*

LARSON: *We received a reply from the Boston Police Commissioner stating that, on the same date, November 18th, the Boston Police officers had entered this building and that no evidence of gaming was found.*

MCMULLEN: *Now, on November 18th, your men were also in the key shop investigating?*

LARSON: *That's correct. This was the same date that our men made the survey.*

MCMULLEN: *And found evidence of gambling?*

LARSON: *Yes.*

CRONKITE: By the fall of 1960, the New England Crime Commission also was investigating the key store.

STRONG: *We'd had many complaints of illegal gambling at the key shop. I had manpower available and assigned agents to investigate this complaint. We went into the shop and placed bets—over fifty of them.*

CRONKITE: *For almost a year, agents of the New England Crime Commission gathered evidence of illegal gambling at the key store. In the spring of 1961, CBS began documenting the Commission's observations with microphone and camera: We present a composite of picture and sound recorded during the course of our investigation.* First, we wanted to know how the bookies operated, and how much business they handled in the course of a day. Reporter McMullen and our cameras began observing the store on June 3rd, 1961, at 5:30 A.M.

MCMULLEN: *The two men waiting in the doorway are bookies who operate at the key store. This is the man they*

are waiting for—the owner of the store—Abraham Swartz. The tall man with glasses, walking behind Swartz is also a bookie who works on the morning shift. The others are either customers or helpers. At 5:30 A.M. the door is unlocked and the key store is open for business. These pigeons appeared out of nowhere, within two or three minutes after they key store opened. We learned that this was a morning ritual. From 5:30 to 8:00 A.M., the number of people who entered the key store totaled, by our count, one hundred and sixty-seven persons. Many of them probably stopped off here on their way to work. Most remained inside for only a few minutes. By 8:05 A.M., this trash can had been placed outside the door. During the day, the bookies brought it out five different times. Inside it, they burned carbon copies of betting slips—their receipts of bets already won or lost. The evidence went up in smoke. These youngsters were on their way to school. By 10:00 A.M., two hundred and seventy-five persons had entered the key store. Persons carrying in satchels or paper bags were of special interest to the New England Crime Commission. Dwight Strong explains why.

STRONG: We suspected that some of these men were pick-up men. A pick-up man is one who goes around and picks up from bookies the various slips and money that have been taken in a tavern, in a store, or a hotel, a factory, or an office, and bring them to some central place. Some of these pick-up men may have a hundred or more slips in one of these bags. At this place, these slips are turned in, and of course, we cannot tell the volume of business by the number of persons who enter through the door of a place like the key shop.

MCMULLEN: By 12:00 Noon, six hundred and fifty persons had entered the door of the key shop. The cars of

customers blocked traffic on Massachusetts Avenue. The owners of these cars came from all walks of life—a postal clerk, a factory worker, a certified public accountant, an engineer.

CRONKITE: A CBS Reporter also entered the key shop—Jay McMullen.

MCMULLEN: This reporter was dressed informally when he entered the key shop with a lunch box at 2:30 P. M. To place a bet you pass beneath these signs—advertising keys and locks. You head toward a small room in the rear of the store. As many as thirty people crowd into this room at one time; to place your bet, you have to wait in line. *This is one of four bookies who works the afternoon shift.*

VOICE: *Missiles from heaven, George.*

MCMULLEN: Notice the small child. "Stick 'em up" is what she said to the bookie. *The betters are not breaking the law—the bookies are. But if the bookies have any anxiety about a raid, they certainly do not show it. Most of their business in the afternoon is in bets on horse races. The minimum you can bet on a horse race at a race track is two dollars. Here, the minimum is one dollar and fifty cents. We watched some of the customers bet as much as fifty dollars—were told that a one-hundred dollar bet is not unusual. The bookies claim that they pay the same betting odds as the race tracks. It's generally reported that most bookies pay lower odds than the track. According to some of the customers, bookies at the key shop have never been known to welch on a bet. As one customer put it, "This is a first-class bookie joint."*

By 2:45 P.M. this reporter had placed his bet and was on his way out of the key shop, past counters where keys are seldom sold. My betting slip was in my hand. I was just one of eight hundred and seventy-five customers who

had entered the key shop by 3:00 P.M., when as usual, it closed for the afternoon. Elsewhere, betting on the horses continued.

CRONKITE: Here, the bettor who has the time and the inclination can bet his entire bankroll, legally. Pari-mutuel horse tracks are licensed in twenty-five states. Total attendance at these tracks last year: forty-eight and a half million persons. The handle, or total amount of money bet: three and a half billion dollars—one billion dollars more than the nation spent last year on new schools, classrooms and text books. From the three and a half billions in bets on horses, the states received two hundred and fifty-eight million dollars in tax revenue. For every bet made here legally, it is estimated that at least three bets are made off-track, illegally, at places like the key store.

We resume now with the activity at this store during the day of June 3rd, 1961.

MCMULLEN: The door of the key store has been locked since 3:00 P.M. At 6:45 P.M. the store once again is open for business. *These people are here either to collect on winning bets made earlier in the day, or to bet on dog races which are run at night.* The customers flocked in in such numbers that it was difficult to keep a count on them. Nine hundred and seventy-three customers had entered the door by 7:30 P.M.

CRONKITE: By 7:30 P.M. Boston's "Wonderland"—the world's largest dog track—is open for business. Here, gambling on dog races is legal. Attendance at this track during the racing season averages twelve thousand persons a night. Total attendance during the 1960 season: one million, two hundred and fourteen thousand. Pari-mutuel wagering on dogs is legal at thirty-five tracks in eight states. At Wonderland, more than six hundred and eighty-

three thousand dollars was wagered in one night. The total amount wagered at dog tracks throughout the nation exceeded two billion dollars in 1960. Two hundred million dollars of this went to the states in tax revenue. It has been estimated that for each bet made at a pari-mutuel dog track, at least one other bet is made off-track. The states receive no tax revenue from off-track bets made with bookies at places like the key store.

McMULLEN: In the evening, you see new faces among the bookies at the key store. The day men have gone home. This is the night shift at work. Here, the betting odds on the dog races are based, as in horse race bets, on the pari-mutuel odds at the track.

CRONKITE: At 8:30 P.M. wagering on the dog races was continuing here at Wonderland dog track.

McMULLEN: At 8:30 P.M. the key shop closed for the day. In this one day, June 3rd, 1961, a total of one thousand, two hundred and forty-six customers had passed through the door.

CRONKITE: Evidence to be detailed later in the program indicates that the gross income of the key store may have exceeded twenty-five thousand dollars a week. That's a million and a half dollars a year, and that's no penny-ante operation, by any means. And yet, it seems small in contrast to some of the largest bookie establishments uncovered by the Internal Revenue Service. A bookmaking operation in Louisiana grossed twenty-three thousand dollars in a single day; another in Indiana grossed more than one million dollars in three days; and still another in California, three hundred and seventy-four thousand dollars in seven days, according to the Internal Revenue Service. Now some of these bookies operated out of taverns and stores like the key shop. In Evansville, Illinois, this tote board used by

bookies was found in the back room of a tavern. Here are adding machines and bags of lottery slips seized in a Miami home. These rifles, shotguns, pistols belonged to a bookie in San Francisco. And this is the cash drawer of a bookie who operated in a small room in Albany, New York. The Internal Revenue Service is the agency best qualified to know how much money the nation's bookies gross each year. H. Alan Long, Director of Intelligence, answered this question.

McMULLEN: Estimates of the gross handle of illegal gambling have ranged from five to fifty billion a year. Has your department made any such estimate?

LONG: No, we have not. We have tried to arrive at a figure, but we have not been able to determine any logical basis for making an estimate.

McMULLEN: Why is it difficult?

LONG: Because the amount of activity varies enormously from place to place, and from time to time, and it is very difficult to determine how many people are actually engaged in business as professional bookies, and how many customers they have, and what volume of business they do.

McMULLEN: Do you think it would be inaccurate to say that illegal gambling is perhaps a multi-billion-dollar-a-year business?

LONG: That may be correct, although I would not want to estimate that it runs very high in the billions.

CRONKITE: The experts may disagree on the total amount of money wagered illegally in the nation each year. But on one point they do agree—and that is that illegal gambling cannot flourish for long unless it is protected. Reporter Jay McMullen discussed this point with Tom Mc-

Ardle, former Chief Counsel, Massachusetts State Crime Commission.

McMULLEN: You told me that during your investigation, you spoke off-the-record with quite a number of bookies. Did they indicate to you how they were able to avoid arrest and stay in business?

McARDLE: *They said that they paid protection.*

McMULLEN: Did they say how much that would be?

McARDLE: No. That was a very difficult matter to discuss with any number of the individuals involved. However, I have seen figures from crime investigations in other states, which unhesitatingly put the figure at fifty per cent of the net profit of the gaming operation.

McMULLEN: *Did the bookies ever tell you that they thought they were paying too much money for protection to the police?*

McARDLE: *Yes, several of them told us that the costs were getting so high that it was becoming more a police business than a bookie business.*

CRONKITE: We'll continue this "Biography of a Bookie Joint" after this message.

(ANNOUNCEMENT)

ANNOUNCER: CBS REPORTS: "Biography of a Bookie Joint" continues. Here again is Walter Cronkite.

CRONKITE: Up to now, we have heard that the key shop had been investigated by two Crime Commissions—the Boston Police, the State Police—and the Internal Revenue Service. *From June the 1st to June 3rd, 1961, we filmed ten members of the Boston Police force entering or leaving*

the key store. We don't know why they came to the key store, or what they did inside. We only know that they were there, as Jay McMullen now reports.

McMULLEN: June 1st, 1961. *This motorcycle policeman entered the key store at 9:17 in the morning. Same day, 11:18 A.M., while this policeman remained inside, betting slips were dumped into the bookies' trash can.*

A few minutes later, another policeman arrived. The man pushing the trash can out of his way is a bookie. Ten minutes later, the same officer departed. 7:00 P.M., same day—June 1st. This is one of the policemen seen on June 2nd, 1961. He entered the key store at 8:58 in the morning. At 9:42 A.M., also June 2nd, this officer drove up in a prowl car. He did not leave the store until ten minutes later. It is now June 3rd, 1961. This officer getting out of the squad car entered the key shop at 8:24 in the morning. The same officer left the store and drove off in a squad car at 8:35 A.M. One hour later, at 9:27 another squad car arrived. The officer stayed inside five minutes. The man coming out of the door now is a detective. We found that he comes from Central Headquarters, Boston Police Department.

CRONKITE: *Other Boston Police officers were seen entering the key store during the course of our investigation.* We must emphasize again that we do not know the nature of their business in the key store. Dwight Strong, of the New England Crime Commission, on the subject of the Boston Police:

STRONG: I think most of the policemen in the Boston Police Department are honest and want to do their sworn duty. However some of them have been in touch with me by calls and letter and have written on Police Department letterhead, although unsigned, suspected illegal gambling operations which they hope we will do something about.

McARDLE: We had a Lieutenant of the Police of a town outside of Boston who testified on the witness stand that he had procured a warrant for—to raid a gaming establishment in his community, and that as he came down the street with the police, for the purpose of making the raid, he saw his Police Chief pull up in front of the place, and then beckon and drive down the street. And the gaming operator came out, and went down, and had a very brief conversation with the Police Chief. When the raid was made, there was nothing there.

CRONKITE: It has been said that police corruption can be found in every state where illegal gambling flourishes. The story has been told in headlines from cities across the nation time and time again. It is, in part, an answer to the question: "What harm can there be in a little two-dollar bet at the corner bookie?" It is not only the police that the bookie may attempt to corrupt. When he was Chief Counsel of the Massachusetts State Crime Commission, Tom McArdle was approached by a bookie who said that he and twenty-four other bookies would like to give McArdle some money as a good-will gesture. Even when McArdle refused and got angry, the bookie continued to press him.

McARDLE: He said to me that he thought that my reaction of anger indicated that I was going to come at a pretty high price. And he said that he thought I probably was thinking of twenty-five thousand dollars for each of these contributors. And then, later, by implication, he indicated that what he had had in mind was that ten thousand would be about—from each—would be about as far as he was thinking.

McMULLEN: Ten thousand from twenty-five bookies—two hundred and fifty thousand dollars. Is that . . .

McARDLE: Yes. Those are all round numbers. He said about twenty-five people.

McMULLEN: And that would be put away for you if you would lay off the investigation?

McARDLE: Well, he didn't ask me to do a thing. He just asked me if he could figure out a way to put some money some where that I could get later, would I do it.

McMULLEN: But wasn't that the implication?

McARDLE: I can't think of any other reason why he would be offering me anything.

CRONKITE: If an opponent of the bookies cannot be bribed, there is another way to handle him. Here is what happened to Dr. Charles Cataldo, a Boston physician, who formed a Citizens' Committee to fight illegal gambling in his community, and who gave evidence of gaming operations to the Massachusetts Crime Commission.

DR. CATALDO: Two days later, when I went out to my car, I saw on the trunk, written in white crayon, the words: "I will shoot you through the face and through the back."

CRONKITE: A reporter seeking information about illegal gambling must be careful—even when talking to officials and employees of the State. For, as we discovered during our observations of the key shop, the employee may turn out to work for the bookie, or be a bookie himself.

McMULLEN: *The man getting out of that car at 5:45 A. M. on the morning of June 1st, 1961, worked at two different places during the day. Early in the morning, he worked as a bookie at the Swartz Key Shop. In a moment, he will be taking illegal bets on the numbers game, on horse and dog races. He will remain inside about three hours. Usually, he left the key shop at 8:30 A. M., in order to be on time for his second job in another section of the city. It took him about fifteen minutes to drive to his office here at the*

Metropolitan District Commission, a State agency, that supervises the State parks, and handles construction contracts.

CRONKITE: It is difficult to know where bookies may be working or where they have influence. The State Tax Department is in this building. Tom McArdle, of the Massachusetts State Crime Commission, sent a State detective here to get some information on a bookie-racketeer.

MCARDLE: Before the State detective got back to our office, which was only a few hundred yards from the State House, a newspaperman called me, and said to me that he had heard that I had a man at the Income Tax Bureau, who was inquiring about Mr. X. And he said, "Just as a friend of yours, I want to tell you that you should be careful who you ask about certain persons and certain things." Another indication was the—what I learned from a conversation with the then Police Commissioner of Boston, who told me that he had made special arrangements, or had to make special arrangements as to certain places for procuring warrants for gaming raids. And what he meant by "special arrangements" was that he would make arrangements either directly with a judge, or in some other way, so that warrants could be obtained rather surreptitiously, or without the general knowledge of those in the court.

MCMULLEN: Why would he have to do that?

MCARDLE: Well, as he said, *the fear that if they were careless about requesting warrants, the word would get to where they were going before the warrant did.*

MCMULLEN: *In other words, leak?*

MCARDLE: *Yes. From somehow—somewhere—those who would learn of it in the court house.*

CRONKITE: *It would appear that the bookies may have contacts even in the legislature of a State.* Jay McMullen talked with Representative Harrison Chadwick, a former member of the Massachusetts State Crime Commission.

MCMULLEN: Is it not true that many of the legislators are lawyers who carry on a private law practice when the legislature is not in session?

CHADWICK: Yes, that's true. They carry on their law practice, both when we are and when we are not in session.

MCMULLEN: *Have any of these legislators who also practice law ever told you that they represented bookies or illegal gambling operators?*

CHADWICK: *Oh, yes. Yes, they do. Several have stated that they had bookies among their clients.*

MCMULLEN: How did they happen to tell you that?

CHADWICK: This came out in the conversation that we had about the Crime Commission and its work.

MCMULLEN: Do you recall anything specific that they said?

CHADWICK: *Well, I recall one who said that he would be glad if we were out of business, because he wanted active bookies for the reason that he got good fat fees.*

MCMULLEN: What's your reaction to this statement printed in *The Boston Herald: "The bulk of votes against the Crime Commission and its recommendations have come from legislators representing districts in which there is heavy off-track betting. They fear the bookies and their customers. They fear the kind of dirty campaigning that the bookies and their overlords can put on against any one who openly fights this kind of organized crime. To such legislators, bookies speak louder than decent citizens."*

CHADWICK: *There's a great deal of truth in the statement which The Boston Herald has made. I would like to distinguish between a wholesale condemnation of legislators, and the fact that relatively few are actively involved in any of the illegal operations of the booking business.* However, it is true that most of us follow the path of least resistance. And in many instances, the bookies are able to throw organizational workers and very considerable finances into a campaign to defeat some one whom they feel is hurting their operations. And consequently, many an honest legislator prefers not to stir up a situation which can only cause him, as he sees it, very likely to come to grief.

CRONKITE: Mr. McArdle on the bookie in politics:

MCARDLE: One of our investigators had under surveillance a prominent gaming operator—a man who had been previously charged with murder. And he followed him into a barroom one day and saw him paying twenty dollars, each, to several persons for helping in the campaign activities of a man who was running for the nomination for District Attorney in one of our counties.

CRONKITE: Dwight Strong.

STRONG: *Recently, we have had an Assistant Attorney General of the Commonwealth, who turned out to be a business partner of a registered bookmaker, a man registered with the Federal Government as a bookie. He has been suspended and removed from office.*

CRONKITE: A two-dollar bet with the corner bookie may result in fear, intimidation, violence, corruption. Some authorities say, and others disagree, that the problem of illegal gambling can best be met by legalized off-track betting. The question of legalized gambling will be examined on a future CBS REPORTS program.

ANNOUNCER: Tonight's report will continue with the attempts to close up this bookie establishment immediately after this message.

(ANNOUNCEMENT)

ANNOUNCER: CBS REPORTS: "Biography of a Bookie Joint" continues. Here again is Walter Cronkite.

CRONKITE: By 1961, the key shop had reached its tenth year of operation. It had survived all efforts to put it out of business. In the summer of 1961, State Police again investigated the key shop. Colonel Carl Larson, Massachusetts State Police:

LARSON: *On August 4th, 1961, the State Police again made a survey of this key shop, and evidence of gambling was found. We again forwarded a letter to the Boston Police Commissioner, informing him of our findings; and a reply received from the Boston Police Commissioner, stated that on August 4, 1961, the Boston Police officers had entered this establishment with search warrants, and made a diligent search of the area, and that some evidence of gaming had been found, but insufficient for prosecution.*

MCMULLEN: *Now, your own men had gone in on August 4th, also, and found evidence. Is that correct?*

LARSON: That is correct.

CRONKITE: CBS presented to the Department of Justice, in Washington, its evidence of illegal gambling at the key store. CBS was informed that the Department of Justice would investigate the matter—that if the circumstances warranted, a raid would probably be made, but under no circumstances would we or any other news media be apprised in advance. CBS continued to film and observe activities at the key store, in the hope that if a raid did occur,

we would be in a position to record it. Our hopes were realized. Jay McMullen reports what happened.

McMULLEN: It is 2:35 P.M., September 29, 1961—one of the busiest times of day at the key store. Suddenly, we noticed that customers were turning away from the door. What we did not know, at the moment, was that Internal Revenue Service agents had entered this store—and a raid was in progress. When these three gentlemen walked up to the door, there was no doubt that T-men had already acted. A few minutes later, a large crowd had assembled. I questioned this man.

You live right here, don't you?

MAN: I have the property here right next door. I own the property next door.

McMULLEN: Have you noticed a lot of activity going on here?

MAN: Oh, of course, there is a continuous—it's amazing, the hundreds of people, each day, going in and out of the place. It's almost ludicrous to watch a key shop and see so many, many, many people walking in and out, and cars double parked here. It just becomes a picture that's so obvious to everybody.

McMULLEN: Did you ever think of reporting it?

MAN: *I've even seen police officers go in and out of the place, and it's so obvious that all of them, even the detectives, know about this. And it's so wide-open—I have marveled that the place can be so wide-open in a state like Boston—or a city like this, and have it go on with everybody knowing it.*

McMULLEN: And how did that affect you insofar as whether or not to report this place?

MAN: Well, it certainly—it showed that there was little use of reporting it, because everybody knew it. And so that there was little reason for my reporting it, and . . .

MCMULLEN: How long has this place been open, as far as you know; that is, engaged in this activity?

MAN: Well, I have had this property for better than two years, and it was going full swing, I'm sure then, and has been going ever since—even when this state gambling—when there was a raid here, oh, back a year or two back, and the police closed down other places, this place continued to stay open.

MCMULLEN: It did stay open?

MAN: It did.

MCMULLEN: Right through it all?

MAN: Yes. In fact, a person that I knew went in and warned them, of something about it coming, and they didn't bat an eyelash. They stayed right open.

MCMULLEN: What would that infer to you?

MAN: *Well, that there was a payoff somewhere. That they paid off.*

MCMULLEN: How do you think the payoff, as you call it, affects this community? How do you think it affects what other people feel about it?

MAN: Well, I think the idea of law and order, as far as that is concerned, the people would have little respect to the actual law and order. I think it has a tendency to make the citizens not uphold the law, like they might ordinarily do.

MCMULLEN: So that it may work in other directions? If a place like this is protected, then there may develop a certain cynicism, you think, toward the law?

MAN: That's right. Of course, this is a thing for our children and for people in general, that—this, of course, is the attitude. I would say this is one of the ramifications of this type of operation going on.

CRONKITE: *The Federal raid also hit three other alleged gambling establishments in the area, including this dry cleaning store.* The Treasury agents had obtained seventeen arrest warrants. Eight bookies at the key store were among those arrested. The charge: failure to register as bookies under the Federal Wagering Stamp Law. *This bookie who had registered could not be arrested.* He walked to his four-thousand-dollar automobile and drove to his home in a fashionable Boston suburb. Later that afternoon, this was the scene in the corridor of the Federal Court House. *These alleged bookies were arraigned before the U. S. District Commissioner.*

At the Swartz Key Store, the Federal agents seized four thousand dollars in cash; apparently, part of the money bet with the bookies on the day of the raid from 6:30 A.M. to 2:30 P.M. How much more might have been on hand at the usual closing hour of 8:30 P.M. is just a matter of speculation. But even four thousand dollars a day, six days a week, comes to one million, two hundred thousand dollars a year.

But the story of the key store does not end with the Federal raid. *Within a week after the raid, the store was reported again open for business.* Jay McMullen counted the number of persons who entered the store in an hour-and-a-half period.

MCMULLEN: *It is the morning of October 20th, 1961. This same key store, recently raided by Federal agents, is back in business. The bookies are operating again at the same*

location. Between 6:30 A.M. and 8:10 A.M. we counted one hundred and twenty-five persons who entered the door.

CRONKITE: The State Police also noticed that the key store was back in operation. Colonel Carl Larson, State Police.

LARSON: *On October 23rd, 1961, information was received by our department that the key shop was back in operation.* I then discussed this matter with the Commissioner of Public Safety, Frank Giles, and he in turn discussed this entire matter with His Excellency, Governor John A. Volpe. As a result of their conference, I was directed by Commissioner Giles to take direct action against the key shop.

CRONKITE: Then, on October 27th, 1961, for the first time in twenty years, the State Police raided a gambling establishment in Boston. They raided the key shop at 7:10 in the morning. The State Police seized two thousand dollars inside the store. The raid resulted in the conviction of two persons. *One of the persons convicted was this man, whom the Federal agents could not arrest, because he had registered as a bookie.* Jay McMullen asked Colonel Larson why the State Police had changed their twenty-year policy of not raiding gambling establishments in Boston.

LARSON: *We have forwarded considerable information of this nature to the Boston Police on many occasions, and they had taken action on this information. However, on information forwarded, pertaining to this key shop, our surveys indicated that no action was taken by the Boston Police.*

CRONKITE: Three days after the State Police raid at the key shop, there was a shakeup in the Boston Police Department. Two of Boston's three Deputy Police Superintendents were demoted to Captain, and five Captains were transferred to different jobs. A Boston Police announcement

said the changes were made to promote the efficiency of the Boston Police Department. At a press conference, Governor John A. Volpe said he expects the Boston Police Commissioner to fulfill his responsibilities in full compliance with the law.

We extended an invitation to Boston Police Commissioner, Leo J. Sullivan, to appear on this program, to comment on the difficulties facing local police departments in coping with illegal gambling, as reflected by the history of the key shop operation. Commissioner Sullivan has replied to our invitation with a letter, outlining problems confronting local police. He points out that legalized on-track betting stimulates illegal off-track betting; that placing a bet off-track is not an offense, and that bookmaking is only a minor misdemeanor. He went on to say that the local police administrator has limited manpower and funds, and that the combined efforts of all law enforcement agencies have failed to dent the framework of illegal gambling. "It would, therefore, be a grave injustice," said the Police Commissioner, "to downgrade an entire Police Department, and to destroy the public image created by the fine accomplishments of many dedicated police officers on the basis of one such gambling establishment. In the final analysis, the people of this and every other community must come to the realization that it is their small, individual bet that finances the illegal gambling empire, and complete enforcement is not possible without the active assistance of all good citizens." Those were the words of Boston Police Commissioner Leo Sullivan.

At this point, you may be inclined to say: "Well, those people in Boston certainly have their problems." Don't deceive yourself. The chances are very great you have the same problem in your community. This is Walter Cronkite. Good night.

FACE THE NATION

Representative-Elect Adam Clayton Powell, Jr.

January 14, 1968

ANNOUNCER: The following program was recorded yesterday.

MR. AGRONSKY: Mr. Powell, you haven't represented the 400,000 people of your Harlem Congressional District since you were elected in November of '66. When are you going to fulfill your responsibilities to represent Harlem in the House of Representatives or stand aside and permit someone else to take over the congressional duties you've chosen to ignore?

MR. POWELL: I will never stand aside. I am going to force the judicial system of the United States to prove that it is equal to the legislative or executive or step down. They will step down. And that is what my lawyers are fighting for now, under Edward Bennett Williams' direction.

ANNOUNCER: In San Francisco, California, in color, FACE THE NATION, a spontaneous and unrehearsed news interview, with New York Congressman-Elect Adam Clayton Powell, Jr. Mr. Powell will be questioned by CBS News Correspondent Morton Dean, Ted Poston of the New York Post, and CBS News Correspondent Martin Agronsky.

MR. AGRONSKY: Mr. Powell, you told my colleague, Morton Dean, in Bimini, at the beginning of last month, that you were thinking of discussing with Floyd McKissick the possible choice of a successor to your seat in the House. Why the change of heart in the last few weeks?

MR. POWELL: Well, I thought that I ought to have someone to back me up *in case the courts don't have the guts to rule correctly,* then there should be someone ready.

MR. POSTON: Mr. Powell, you won a smashing reelection victory last April 11th.

MR. POWELL: Yes, seven-to-one.

MR. POSTON: Yes, it was. Why didn't you go back then and claim your seat?

MR. POWELL: You see, if I had taken my seat in the April election I would be the youngest freshman in Congress. My court case is based on the November election, which would establish my seniority.

MR. DEAN: Mr. Powell, from our tours through Harlem, the chorus seems to be getting louder and louder, that Adam Clayton Powell should return or bow out, that "we need representation and we're not getting it." Even some of your old supporters are saying that perhaps you're being selfish, putting your own self-interest above that of your own constituency. How do you answer these calls for you to return now even if it means arrest?

MR. POWELL: I don't know who you see in Harlem, but my mail is the exact opposite. My mail in Bimini, my mail in Washington, my mail in New York, my club house in New York is as packed as it ever was. My church is as packed as it ever was. And so you probably talked with the wrong people.

MR. DEAN: Well, some members of the Urban League of Harlem, CORE. People suggest that the services of the Abyssinian——

MR. POWELL: I'm talking about the people. You're talking about the Urban League. That's not the people.

MR. AGRONSKY: How are you in touch with the people in Bimini?

MR. POWELL: Well, my mail in Bimini runs around 2,000 2,500 letters a month. And as I left to come here there were five people from my district down there. There will be more down next week. They come down to see me. In the meantime, my offices at the church, the club house and in Washington are servicing the people and not one complaint in one year has been made.

MR. DEAN: Do you think you might be unfair to the constituents in Harlem who desperately, because of conditions there, desperately need personal representation in Washington?

MR. POWELL: Personal representation in Washington does not help the conditions of the people. The conditions of the people are helped by the handling of their complaints. Personal representation means only the vote and the voice on the floor.

MR. AGRONSKY: You certainly wouldn't deny the importance of that.

MR. POWELL: Of course not. That is why I am fighting——

MR. AGRONSKY: If you are going to take a position or propose legislation which will be helpful to the people of your district you have to be there to do it and yet you're not there, you are in Bimini.

MR. POWELL: That's correct. I am trying to point out that the people are being serviced. Furthermore, I believe that the black people of this country, the great majority, including my district, want to see whether this is really the land of the free and the home of the brave or whether it is

a second-class government for black people and first-class for whites.

MR. DEAN: Mr. Powell, last month, *eleven Congressmen* introduced a bill which would set up a permanent office on Capitol Hill for your district and have four staff members to service it while you are in these difficulties. And I think you called it at the time a bill—*a cute form of liberalized racism.*

MR. POWELL: *And colonialism and the plantation system.*

MR. DEAN: But don't you think that there should be someone there to take care of the day-by-day complaints?

MR. POWELL: Well, I have two ladies there, Mrs. Dolores Gillespie and Miss Cleo Lewis.

MR. DEAN: Well, would you object to four?

MR. POWELL: Yes. If Pat Jennings, of Virginia, is going to take over Harlem and hire who he wants to hire and fire who he wants to fire and fix their salaries, yes, because Harlem then becomes a plantation in Virginia.

MR. AGRONSKY: Yes, but none of these opportunities for Harlem to become a plantation in Virginia, as you put it, would arise if you would go back and take your place in the Congress of the United States or see if you are going to be denied that place.

MR. POWELL: I will go back.

MR. AGRONSKY: When?

MR. POWELL: I will go back whenever Bennett Williams tells me to go back. *I will go back when the Supreme Court gets enough guts to rule one way or the other.* I am not going to subject myself to becoming a freshman, the lowest one on the totem pole, after twenty-four years

of service and six years as the best chairman in the house, according to Jack Kennedy, in writing, Lyndon Johnson, in writing, and John McCormack, in writing, "You are the best chairman that we have in the House of Representatives."

MR. AGRONSKY: Yes, but now you're nothing in the House of Representatives.

MR. POWELL: Oh, yes, I am. I am the great enigma that is going to put the white man on the spot in this Nation and in Congress *as to whether they are going to keep Negroes down and let a person like Tom Dodd go unscathed.*

MR. DEAN: Mr. Powell, in past conversations and interviews we've always talked rather frankly about all subjects, I think it is proper to bring this up at this time, a point that has never really been made clear. Your estranged wife, in a magazine article last year, quoted you as admitting that you were not Negro and then, if I remember correctly, back in 1963 you told a wire service reporter that you were a Negro by choice. And I was wondering if you could explain your background to solve what is a mystery about you.

MR. POWELL: In the first place, *anyone that has an estranged wife is automatically inherited a liar.* In the second place, I don't recall telling any wire service that. All you've got to do is read my father's book, Against the Tide. My grandfather was a branded slave. My father was born in a log cabin in Franklin County, Virginia, a family of seventeen. And one thing, you see, that white people especially don't understand, the color is not what you are. Walter White, for instance, the great Secretary of the NAACP, is much more white-looking than I, blue eyes and blond hair. But he was a fighter. Black is a

way of thinking, a way of love, a way you live and a way you act.

MR. AGRONSKY: Mr. Powell, at the University of California campus at Berkeley, you said to the students that violence should be used if necessary by black power advocates. You call on the white students to follow black leaders. Is that correct, sir?

MR. POWELL: Correct.

MR. AGRONSKY: Right. Now, the chief spokesman of the black power movement, men like Stokely——

MR. POWELL: I don't know who that is.

MR. AGRONSKY: —men like Stokely Carmichael——

MR. POWELL: He is?

MR. AGRONSKY: —men like Rap Brown, you would not regard them as chief spokesmen?

MR. POWELL: Spokesmen?

MR. AGRONSKY: Spokesmen.

MR. POWELL: Oh, I thought you said spokesman. I would say Rap and Stokely and Floyd McKissick, those are the three now.

MR. AGRONSKY: Okay. Now, they have expelled the whites from the civil rights movement. How can you call for the whites to follow black leadership and at the same time deny them participation in the civil rights movement?

MR. POWELL: Deny them participation at what level?

MR. AGRONSKY: In any level.

MR. POWELL: No, sir.

MR. AGRONSKY: As followers, advocates, where?

MR. POWELL: Followers, yes.

MR. AGRONSKY: But not as leaders?

MR. POWELL: No sir. That day is gone. The day that a black man is put on the board of the American Jewish Congress or the Federation of Italian Society or the Polish-American Congress, the Sons of St. Patrick, black men on the board of directors, then I will change my position.

MR. AGRONSKY: Well, that is one way of putting it. Let's take however, a——

MR. POWELL: That's the only way of putting it.

MR. AGRONSKY: —let's take a contradiction, perhaps, in your position, what seems to be one, in any case. Throughout your career in the Congress of the United States, in the House of Representatives, you became famous for the Powell amendment——

MR. POWELL: That's correct.

MR. AGRONSKY: —for full intergration, which you added to every piece of legislation that came before the House of Representatives.

MR. POWELL: Correct.

MR. AGRONSKY: Well, if you believe in full intergration, how would you deny whites participation in the civil rights movement?

MR. POWELL: The Powell amendment was not full integration. The Powell amendment was the denial of funds from schools that refused to accept Negro, black boys and girls. That is the Powell amendment. That is the Powell amendment. That is the law now.

MR. POSTON: On this mater of leadership, you told the students at San Diego the other day that, whether they liked it or not, the black people are their leaders.

MR. POWELL: That's correct.

MR. POWELL: That's correct.

MR. POSTON: And you listed——

MR. POWELL: Stokely——

MR. POSTON: —Stokely——

MR. POWELL: —Rap——

MR. POSTON: —Rap——

MR. POWELL: —McKissick——

MR. POSTON: —McKissick——

MR. POWELL: —and the old man of the sea.

MR. POSTON: —and the old man of the sea, Adam Clayton Powell.

MR. POWELL: That's right.

MR. POSTON: Was there an oversight on your part? Are you saying in that that men like Roy Wilkins, Whitney Young, Bayard Rustin, Martin Luther King are not Negro leaders? You didn't list any of those.

MR. POWELL: They are not leaders of the surging, incoming, black masses composed mainly of the young people. Even Martin Luther King came to see me a week ago in Bimini—a week and a half ago—with Bernard, his assistant, and a secretary, and for three days discussed that he believed that it was time for him to change his course of action.

MR. AGRONSKY: To do what?

MR. POWELL: He has already announced that he believes that he is going to—this coming summer—have a strong

social action program that is not going to be as peaceful as it was in the past.

MR. AGRONSKY: Are you advocating violence, Mr. Powell?

MR. POWELL:. I am advocating that if I see my wife or my son, my sister or my mother and father being kicked around, then I am going to do my best to kick around whoever is doing anything to them. That's the violence.

MR. DEAN: But does that answer the question whether you advocate what *Rap Brown and Stokely Carmichael have been advocating, guerrilla-type warfare in the cities of our country?*

MR. POWELL: I do not advocate guerrilla-type warfare but I do advocate self-defense.

MR. DEAN: Well, do you think that the riots in the cities in the past several years have been out of self-defense?

MR. POWELL: No, indeed, because the casualties—you see, I walked through Watts the other day, Charcoal Alley. Forty-eight people were killed there, all Negroes except for two or three Mexican-Americans.

MR. DEAN: Then you disagree with what has taken place in those cities, then, if you don't believe——

MR. POWELL: Oh, I am a pacifist, always have been. I disagree with anything that causes the death of a man. But I totally disagree with the death of black people just without any thought, without any plan. *We had policemen in Harlem, for instance, use live ammunition without first trying teargas in the last riot we had. That is inexcusable.*

MR. AGRONSKY: Mr. Powell, are you suggesting that the—what ones might call the white power structure, the admin-

istration, for example, in Washington, the municipal administrations in various cities where we've had racist problems, are dedicated to the principle of keeping down the black people, that they are turning on—that they are precipitating this violence, that in every instance it is their fault?

MR. POWELL: All right, now the White House just concluded a conference of top police people in Washington, teaching them new methods to cope with the riots. Why couldn't they have had a conference of grass root black men and black women, to teach them how to better themselves and get the jobs they need? That is number one.

MR. AGRONSKY: Well, they are trying that all the time.

MR. POSTON: Wasn't there a White House conference——

MR. POWELL: No, no, no, no. I was the author, of my committee, of the Manpower Development Training Act, and the poverty bill, and those gradually became—lost the thrust, that you know as well as I do that the poverty program is a flop.

MR. AGRONSKY: Well, you know as well as I do that the President of the United States, Mr. Johnson, never wanted it to be a flop, that he sought——

MR. POWELL: That's correct.

MR. AGRONSKY: —to get it through the House of Representatives.

MR. POWELL: That's correct.

MR. AGRONSKY: —and couldn't.

MR. POWELL: What did you say?

MR. AGRONSKY: Well, certainly he sought to get what he needed in the poverty program——

MR. POWELL: Yes.

MR. AGRONSKY: —through the House and the Senate——

MR. POWELL: Yes.

MR. AGRONSKY: —and couldn't.

MR. POWELL: Well, he got it under me.

MR. AGRONSKY: Well, the point I'm making is that the administration—and I would say that Mr. Johnson has demonstrated it—this is not in terms of defending the President but responding to your point that the white power structure, in effect, doesn't care—has done everything it can to advance the cause of civil rights programs. You certainly would give the President that.

MR. POWELL: Civil rights doesn't mean anything. That is one thing every white man hangs his hat on.

MR. AGRONSKY: Well, let's talk about the poverty program——

MR. POWELL: Civil rights doesn't mean anything.

MR. AGRONSKY: —and the economic——

MR. POWELL: All right.

MR. POSTON: What do you mean, "civil rights doesn't mean anything"?

MR. POWELL: All right. What does civil rights mean in the North, Ted?

MR. POSTON: I'm asking the question.

MR. POWELL: All right, I'm answering you. The Civil Rights Act, for instance, is an act to do away with de jure segregation, but in the North it is de facto. It doesn't——

MR. POSTON: You're talking about civil rights law. I mean civil rights themselves.

MR. POWELL: Oh. Oh, I agree. We haven't gotten to that in our legislative history yet, real civil rights and real human rights.

MR. DEAN: You have condemned Congress for failing to live up to the promise of the Great Society, but don't you agree with what many observers say, that Congress is simply reacting to the riots in the streets of Negro communities by becoming more fiscally conservative as far as antipoverty programs are concerned?

MR. POWELL: Well, that is what they've done and all they are doing is opening up a Pandora's box and they think they've won a victory by doing that. It is going to be a big victory because the more you keep the black man and black woman, especially the young men and young women, in the ghetto and keep them socially ostracized, economically exploited and miseducated and politically disfranchised, the more trouble you are going to get in the United States of America.

MR. POSTON: But to come back——

MR. POWELL: And nobody can stop it.

MR. POSTON: To come back to you for a minute——

MR. POWELL: Armored cars, for instance, now.

MR. POSTON: Let me come back to you and your particular case. Representative *John Conyers,* of Detroit, has appeared to be one of the most ardent supporters for your reinstatement.

MR. POWELL: Yes.

MR. POSTON: He put out a minority report, he opposed your expulsion. He opposed your loss of chairmanship and the $40,000 fine. *Yet, when the Detroit riots occurred and he was beaten and his office was burned, you said, "No wonder he was hit by a rock, no wonder black people burned his office. He was a black Judas."* Why?

MR. POWELL: All right. Number one, Conyers has been very clever. He puts out a minority report but he voted for the report. He gets five minutes in the course of the debate on one named Adam Powell and he devotes three minutes of it praising Claude Pepper for being a great man. *Claude Pepper was one of the number one racists on Manny Celler's committee against me.* He's being very clever. But, you see, the man in the street knows the story, baby, even though the press may not tell him. He knows the story. Why would they have done that to him?

MR. DEAN: A number of Negroes have threatened to close down the Democratic National Convention in Chicago this summer. Will you be there to join with them? Do you agree that this is perhaps a proper way of advancing the cause of what Negroes want for themselves?

MR. POWELL: I don't know whether I am going to go to either of the conventions.

MR. DEAN: But do you agree with——

MR. POWELL: But I do say that there should be no demonstrations at either convention unless they are positive demonstrations with specific goals spelled out.

MR. AGRONSKY: Well, then, are you against the proposal to close down the Democratic Convention?

MR. POWELL: I am against the proposal until they have specific goals spelled out.

MR. AGRONSKY: Well, they have not spelled out those specific goals.

MR. POWELL: All right. For instance, I would say the Mississippi delegation of black people should be seated and not the whites.

MR. DEAN: Dick Gregory says unless the City of Chicago passes an open housing law, that, at the risk of his life, there will be no convention in Chicago.

MR. POWELL: Well, that is his personal opinion. That is his personal dedication. That is his personal conscience.

MR. AGRONSKY: Well, does it make sense to you? Would you advocate that kind of policy?

MR. POWELL: I would not advocate in those terms but I—you see, the breaking point has come, there is no longer any more room in the timetable of the forward march of black people for gradualism, for the old shibboleth "education is what we need." The breaking point has come and it is, they say, now. We're dieing in Vietnam and why should we not die in the streets of America, if necessary.

MR. AGRONSKY: Okay. You say now and you ask that question. Do you recommend people go out and attempt to overthrow this government by force and violence? Is that what you're talking about?

MR. POWELL: Not overthrow the government.

MR. AGRONSKY: What do you mean?

MR. POWELL: I recommend that if you have been slapped on the cheek twice, as Jesus once said, and you're not getting anywhere with your peaceful negotiation, then you've got to go ahead and do what you can do by other methods, whatever they may be, to get what you want.

MR. AGRONSKY: To use your analogy, do you feel that the slapping on the cheek has taken place twice already and that the time has come to undertake the other methods?

MR. POWELL: I say it has taken place, 300 years of slavery, 100 years of quasi freedom—yes, it has taken place 400 years now.

MR. AGRONSKY: Well, let's not shilly-shally, let's get down to what you're really talking about, the nitty-gritty, if you like.

MR. POWELL: Yes, let's go.

MR. AGRONSKY: Are you telling people that the time has come in this country to go into the streets and to get what they seek by violence, that they no longer should wait?

MR. POWELL: I'm telling them the time has come for the administration in Washington and everywhere else to stop fooling around with these programs, stop paying huge salaries on the poverty program, get rid of Sarge Shriver or let him resign from the Peace Corps, the poverty program needs one person to direct it, and get down into the poverty areas and let the poor—let the poor administer their programs.

MR. AGRONSKY: But when you say——

MR. DEAN: I think Martin's point was, earlier in the broadcast you said violence as a very last resort——

MR. POWELL: Correct.

MR. DEAN: —and self-defense. A moment ago you said that perhaps the Negroes had been slapped twice, as long ago as 300 years——

MR. POWELL: Correct.

MR. DEAN: —indicating that perhaps you do advocate violence now.

MR. POWELL: I do not advocate violence and never will, but I understand it when it happens. I understood it in Watts the other day when I talked to the people there, the grass roots people. Nothing has happened in Watts . . . except a picnic. The jobs haven't been obtained. The manpower development training has not gone in there en masse to train these young teenagers that practically tore me apart when I walked down the streets the other day. In other words, these programs are not getting down to the

332-498 O - 69 - 14

poor black or white. You know, we have 1,500,000 white families in Appalachia—white families—making $1,000 a year or less?

MR. AGRONSKY: What is your point? Would you have them go into the streets?

MR. POWELL: Them go in the streets? No. My point is that the administration should have the proper people in charge to get down with them and get these programs into the hands of poor people.

MR. AGRONSKY: Well, is your point also that the administration isn't trying that, that they've ignored the problem, that they are not aware of it? Are you the only one who knows about it and is trying to do anything about it?

MR. POWELL: Oh, you know that is not true. Everybody looking at that program today knows that.

MR. AGRONSKY: Yes, but that is what you're indicating. I know it is not true and you know it is not true.

MR. POWELL: All right, then. Why aren't they doing it, then? You can't blame it on Washington. *Edith Green's new phony amendment*—the program has gone to pieces.

MR. AGRONSKY: Well, they must do it within the fabric of the system that we have to do these things.

MR. POWELL: Under Edith Green's amendment, which was carried the other day, the program has gone to pieces. This now has given the controls to the local counties and cities. Can you imagine black people in Mississippi getting a fair break, which they didn't get before, now the control is in the hands of Mississippi?

MR. DEAN: Isn't this what people back in Harlem are saying when they urge you to come back, settle your score so that you can get back to Washington and do——

MR. POWELL: I can't—you want me to go to prison for three months *for an indecent, obscene, illegal, unilateral order by one named Matthew Levy?*

MR. DEAN: Well, certainly some arrangement should be made to keep your congressional——

MR. AGRONSKY: That has nothing to do with it.

MR. POWELL: It has a lot to do with it.

MR. AGRONSKY: No. Let's talk——

MR. POWELL: *I would go to prison for three months for a cause but not for an obscenity.*

MR. AGRONSKY: But you're turning it to a different point.

MR. POWELL: I am not turning to a different point.

MR. AGRONSKY: What we're talking about is you're going——

MR. POWELL: You may be thinking differently but I am not turning to a different point.

MR. AGRONSKY: We were talking about you're going back to the House of Representatives. We're not asking——

MR. POWELL: I am not going back and accepting the low man on the totem pole.

MR. AGRONSKY: Well, that's different.

MR. POWELL: That's correct. But, you see—

MR. AGRONSKY: You're not now talking about an obscenity or three months in prison.

MR. POWELL: That's right.

MR. AGRONSKY: I want to make that clear.

MR. POWELL: All right.

MR. POSTON: But, Mr. Powell——

MR. POWELL: And I want to know when the courts are going to stop filibustering on democracy.

MR. POSTON: Looking at the court case, if——

MR. POWELL: Which one, now? Which one? There are three.

MR. POSTON: Well, I was speaking about your suit for reinstatment.

MR. POWELL: Suit for reinstatement.

MR. POSTON: If they fight on up to the Supreme Court——

MR. POWELL: Yes.

MR. POSTON: —should be turned back——

MR. POWELL: Yes.

MR. POSTON: —and you would decide, maybe, eventually, that you wouldn't return to Congress——

MR. POWELL: Yes.

MR. POSTON: —who, among the hopefuls that are springing up so rapidly in Harlem, would you support as the best man to replace you?

MR. POWELL: I don't know yet.

MR. AGRONSKY: Would you accept that someone should replace you under those circumstances?

MR. POWELL: If the Supreme Court says no and the Supreme Court therefore has relegated themselves to a second-class position in the tripartite system we have of government, then I say sorry about that, baby, you're finished. Now I want to rest the rest of my life.

MR. DEAN: On another topic, Mr. Powell, the most militant of the young Negro leaders have urged young Negroes not to submit to the draft. Do you subscribe to this?

MR. POWELL: That is a matter of conscience. I am a pacifist always have been a pacifist. And if I was of draft age now I wouldn't submit to it.

MR. POSTON: Just one other thing, Mr. Powell——

MR. AGRONSKY: Would you say that it should be matter of conscience rather than a matter of color, I mean let's put it that clear?

MR. POWELL: Conscience. Conscience.

MR. AGRONSKY: It should not be an appeal to Negroes not not to register, an appeal to those who are against whatever the policy is.

MR. POSTON: Just one other quick question.

MR. POWELL: It's just that we have Negro leaders that the white people don't have. White young people do have leaders like Dr. Spock and my good friend, young Sloan Coffin, Jr., who were indicted by a federal grand jury because they believed moral law was greater than any law.

MR. POSTON: Mr. Powell, just this.

MR. POWELL: Yes.

MR. POSTON: Recently SNCC, which you've praised on this program, put out a newsletter in which they assailed Israel and the Jews in the June war and also accused the Israelis of practicing genocide. Do you share this view?

MR. POWELL: No, indeed, I do not share the attack of any of the minority because the attack of any minority eventually will revert upon me.

MR. AGRONSKY: Mr. Powell, I regret we have run out of time. Thank you very much for being here to FACE THE NATION.

ANNOUNCER: Today on FACE THE NATION, New York Congressman-Elect, Adam Clayton Powell, Jr., was interviewed by CBS News Correspondent Morton Dean, and Ted Poston of the New York Post. CBS News Correspondent Martin Agronsky led the questioning. Next week, another prominent figure in the news will FACE THE NATION. FACE THE NATION was recorded on Saturday at Station KPIX, in San Francisco.

Commission's Summary of Programs Attached to the Commission's Ruling in *Times-Mirror Broadcasting Co.*, 24 Pike & Fischer, R. R. 404, 409-412 (1962)

August 27, 1962

DUGGAN—stated that the Democrats have cried "smear" over everything Nixon has said but now it was Nixon's turn. "It is an amazing thing how much mud the Democrats have thrown."

With respect to a labor convention held at Long Beach, California, Duggan stated that Brown had called Nixon a "coward" for not attending when Brown knew that Nixon could not have attended even if he so desired.

With respect to the Birch Society, Duggan stated that: "why don't they [the Democrats] keep the Communists out of their party"?

PUTNAM—stated that George Miller, a Democratic State Senator, was quoted as saying "at best we have no more than thirty-five Communists in California's Democratic organization".

With respect to the Hughes loan from the Hughes Tool Company to Mr. Donald Nixon, Duggan quoted a Nixon spokesman who stated that "this is old, very tired and unproductive Brown and if this is all Brown and his henchmen have to talk about they are in serious trouble".

With respect to certain automobile bumper strips which apparently read "is Brown pink?", Putnam quoted a Republican spokesman who stated "I can't recall anyone ever asking Dick Nixon if he is pink."

September 1, 1962

DUGGAN—devoted a substantial amount of time (about three pages of a single spaced typewritten script) to the Institute of Pacific Relations. Duggan stated that the Institute is headed by Frederick V. Fields, whom Duggan

calls "a known Commie" and Owen Lattimore, whom Duggan considers a leading member of the Communist conspiracy. After attacking the Institute at great length, and attacking those organizations (such as Time-Life, Inc., Rockefeller Foundation, etc.) and persons who support the Institute, Duggan stated that anyone who supported the Institute or who held stock in a corporation that supported the Institute, was selling out the United States. Duggan stated that the Institute is in part responsible for the image that Nixon is a man who can't be trusted and that the Institute has smeared Nixon's character.

September 4, 1962

DUGGAN—interviewed John Rousselot, Member of Congress, concerning the connection between the Americans for Democratic action and Governor Brown, and Stanley Mosk, the Attorney General of California. During the interview it was stated that ADA "pulls the string on Brown and Mosk".

September 5, 1962

DUGGAN—states he is supporting Nixon and refers to Brown as the "portly, panting Governor".

September 7, 1962

DUGGAN—supports Nixon on loan from the Hughes Tool Company to his brother. States that the loan is "only used as a smear" against Nixon.

September 8, 1962

DUGGAN—conducts interview with telephone callers. In answer to question whether Governor Brown is a native Californian, Duggan stated that he was, which "just shows

you that lots of things can happen in California". Duggan further stated that "if he's got some sort of program I wish he'd tell us about it, instead of mentioning Nixon constantly and what Nixon is doing to him". Finally, Duggan stated that Nixon is attacked for what others can get away with.

September 10, 1962

DUGGAN—interviewed an alleged former member of the Communist Party of the United States who spoke of alleged Communist infiltration of the California Democratic Clubs. The interviewee stated that he attended meetings of the Communist Party where infiltration tactics were discussed and that infiltration had been accomplished.

September 11, 1962

DUGGAN—implies strongly that California Democrats are un-American and that their views are "foreign".

September 13, 1962

DUGGAN—"he [Brown] has a nice record. He's never been in jail."

September 15, 1962

DUGGAN—discussing Harry S. Truman's campaign visit to California, states that Truman, in his remarks about Nixon, has behaved like a spoiled brat and a poolroom thug. Duggan sees this as a reflection of the Democrats' wish to see Nixon destroyed. Duggan says the reason for this feeling is: "because the longer he stays in public life—and God help the liberals if he is ever elected President—because then perhaps we will have some investigations that will show them for what they are". He implied that Nixon was the only candiate concerned with preserving the Constitution, institutions and sovereignty of the United States.

September 17, 1962

DUGGAN—quotes an article printed in the Citizen's United Press, Inc. This article, ostensibly signed by three former undercover agents for the FBI, attests to the fact that they have personal knowledge of members of the Communist Party as well as those furthering Communist causes actually joining and acting as officers, delegates and members of the California Democratic Council. Duggan names several persons who have acted as agents for the FBI and says "they [the Democrats] can go to these persons—who can identify—have identified the various members of the Democratic Council as members of the Communist Party . . . and that's a definate testimony that they have infiltrated the California Democratic Council". He states that it seems every time Nixon criticizes the Democrats they yell "smear". As an example of this, he cites the reaction of the Democratic Party to Nixon's comments on the California Democratic Council Convention and its rejection of a bill, brought up at the Convention, which "would kick the Communists" out of the party.

September 20, 1962

DUGGAN—comments that Brown is mad at Nixon because of Nixon's treatment of Helen Gahagan Douglas. He states that if Mrs. Douglas was not soft on Communism she was ignorant of it and that ". . . she wasn't really capable of holding the office for which she was aspiring". He then states that Brown, as Attorney General of the state, issued a pamphlet intended to be a guide for all peace officers in the state on race relations. Duggan says that the bibliography for this guide contained a large number of works by "Communists, fellow travelers, pro-Communists . . . wild eyed liberals". States that Brown was either soft on Communism when he issued the pamphlet or couldn't spell Communism.

Concludes by saying "he is one of the greatest ignoramuses on Communism that ever lived or he is soft on it". During the program; Duggan quoted State Assemblyman Louis Francis as saying "the Governor's position is not surprising in view of his background of apathy and unconcern about Communism and subversion".

September 21, 1962

DUGGAN—quoted Nixon as saying "I want the government to take less from the people so that the people will have more to spend on themselves". Then deprecates Brown's response which sets forth the reasons for taxation. Concludes by stating that if Brown is elected the state will require additional mental health clinics.

September 22, 1962

DUGGAN—quoting Nixon's attitude toward Brown's feelings on subversives states: "Nixon feels Brown wouldn't know a subversive if one came up and bit him". States that during Brown's four years as Governor some ". . . highly questionable people that have been—refused to answer questions before an investigating committee on Communism . . .": have given speeches on University campuses.

September 24, 1962

DUGGAN—commenting on Brown's requests for federal aid in dealing with the California crime problem and Mayor Yorty's conference with Robert Kennedy on the Moslems in Los Angeles, Duggan wanted to know what Brown and the others had been elected for if they were going to go whining to Washington for help. He notes that a group had been formed to run Adlai Stevenson for Governor. He asks what it would be like with Stevenson as Governor and

answers the question by stating that it could be another Cuba.

September 25, 1962

DUGGAN—states that the California Democratic Party is not really a Democratic party. It should be more properly called a liberal party. He compares it to the Illinois Democratic Party and says although that state party was not so "holy" at least it wasn't international minded. He states that the CDC group in California is actually an Adlai Stevenson group and this was demonstrated by the fact that half the California delegation to the Democratic National Convention voted for Stevenson.

October 1, 1962

Concerning Richard Nixon's remark that State Assemblyman Burton was present at the San Francisco riots, a charge which Burton denied, Duggan stated that he believed Burton was present at the riot and that Brown had stated that Burton's work in the Legislature was excellent. "He was for the sick and the lame and the lazy and he likes 'em." And "if Burton says he wasn't there, why, we'll have to find out who was".

October 3, 1962

DUGGAN—states that he is presenting a member of the State and County Democratic Parties in order to maintain a non-partisan position. The Democrat was a Mr. Robert Kiberhall. Upon being questioned, Mr. Kiberhall stated that he was critical of Brown's attitude toward the Mexican-American community in California because, despite the fact that this group has been loyal to the Democratic Party, Brown had appointed only 22 Mexican-Amer-

icans to positions in the state government. Mr. Kiberhall stated that he is urging the Mexican-American community in his district to abstain from voting for Pat Brown although he is asking them to support every other Democratic candidate.

October 8, 1962

Commenting on the ACLU'S position with respect to the release of General Walker from a Federal Hospital, Duggan says that it is amazing how Pemberton (John Pemberton, Jr., Executive Director of the ACLU and a Republican), Pat Brown and the CDC and others can equate the John Birch Society with Communism or fascism.

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SUPREME COURT, U. S.

OCT 11 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 2

RED LION BROADCASTING CO., INC., Licensee of Radio Stations WGCB—AM-FM, Red Lion, Pennsylvania,
and
REVEREND JOHN M. NORRIS, Individually and as President and 80% Stockholder of Red Lion Broadcasting Co., Inc., Post Office Box 88, Red Lion, Pennsylvania, *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	3
Constitutional Provisions	3
Statutes	4
Regulations	6
STATEMENT OF THE CASE	6
ARGUMENT	11
CONCLUSION	14

CITATIONS

Associated Press v. Walker, — U.S. —, 18 L.ed 2d 1094	12
Cullman Broadcasting Co., Inc., 25 Pike & Fischer Radio Reg. 895 (1963)	13
N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963)	12
New York Times Company v. Sullivan, 376 U.S. 254	12
Speiser v. Randall, 357 U.S. 513 (1958)	12
Title 47 U.S.C.A. Communications Act of 1934 as amended	4
Section 315	4
Section 326	5
Federal Communications Commission Public Notice, July 26, 1963, FCC 63-734; 25 P & F Radio Reg. 1899 (1963)	6
FCC Fairness Primer, 29 Fed. Reg. 10415 (1964)	13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered June 13, 1967, dismissing a Petition to Review and set aside an Order issued by the Federal Communications

Commission.[1] The opinions of the Circuit Court of Appeals, not yet reported, are appended as Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 5 U.S.C. 1040. The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Sec. 402(a) of the Federal Communications Act of 1934 as amended, 47 U.S.C.A. 402(b), and 5 U.S.C.A. 1009(c) and 1009(e), and 5 U.S.C.A. 1032.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fairness Doctrine promulgated and applied by the Federal Communications Commission violates the First and Fifth Amendments to the Constitution, and, particularly whether under the facts of this case the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the First and Fifth Amendments to the Constitution.

2. Whether Section 315 of the Communications Act of 1934, as amended in 1959 (47 U.S.C., Sec. 315 (1962), amending 48 Stat. 1088 (1934)) adopted the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report, Editorializing by Broadcast Licensees,* (Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949)) and if so, whether section 315 constitutes

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[1] Hereinafter referred to as the Commission.

an unconstitutional delegation of Congress' legislative function.

3. Whether the Fairness Doctrine, as set forth above, is unconstitutionally vague, indefinite, uncertain, and lacks the precision required when legislation which affects the basic freedoms guaranteed by the Bill of Rights is adopted.

4. Whether section 315, as stated in (2) above, violates the ninth and tenth amendments to the Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

TITLE 47 U.S.C.A. COMMUNICATIONS ACT OF 1934 AS AMENDED

Section 315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. June 19, 1934, c. 652.

Section 326. Censorship.

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Regulations

Federal Communications Commission Public Notice, July 26, 1963, FCC 63-734; 25 P & F Radio Reg. 1899 (1963)

> (a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response. (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer RR 951, 953).

STATEMENT OF THE CASE

The challenged order of the Commission directed the petitioners to grant free time over radio stations WGCB—AM-FM to one Fred J. Cook, to respond to a personal attack made on him over the facilities of these stations by one Reverend Billy James Hargis. The order required petitioners to grant free time, even though Cook was financially able to pay for the time.

The origins of the present controversy are accurately summarized in the opinion of Circuit Judge Tamm, (App. A., pp. 4, 5) as follows:

> "Petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. In November 1964, petitioners broadcast a fifteen minute program by a Reverend Billy James Hargis as part of a program series entitled, *The Christian Crusade.* The program included a discussion of the 1964 presidential election and a book concerning

the Republican campaign entitled, *Goldwater—Extremist on the Right,* written by Mr. Fred J. Cook. During the course of the program and as part of the broadcast, Reverend Hargis made the following statements concerning Mr. Cook.

> 'Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation* * * *. Now among other things, Fred Cook wrote for *The Nation* was an article absolving Alger Hiss of any wrong doing'* * * there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency * * * now this is the man who wrote the book to smear and destroy Barry Goldwater called Barry Goldwater—Extremist Of The Right.'

"Thereafter, Fred J. Cook wrote a letter to Radio Station WGCB inquiring whether Reverend Hargis had, in fact, made the above remarks. Cook requested time to reply to the Hargis remarks if they had, in fact, been made and specifically requested that the reply time be furnished at the expense of WGCB. In response, WGCB furnished Cook with its rate card so that he could arrange for the time he might wish to purchase and furnished him copies of letters which it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. A further exchange of letters occurred, after which, Cook filed a com-

plaint with the Federal Communications Commission. In his complaint, Cook charged that Radio Station WGCB had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. Cook also charged WGCB was insisting upon payment from him for any reply broadcast. The Commission brought the complaint to the attention of Radio Station WGCB and requested an answer within twenty days. As a result of this letter, additional letters were exchanged between the radio station and the Commission".

The additional letters exchanged between the radio station and the Commission, beginning with the Petitioners' reply to the Commission's inquiry, are set out in full in Judge Tamm's opinion, (App. A, pp. 5-18) to which reference is made. In summary, the petitioners in their response stated their understanding of the requirements of the Fairness Doctrine to be that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and the Petitioners said that their letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so. To these statements the Commission answered (R. 14-16):

"The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack ' * * * on an individual's or group's honesty, character, integrity, or like personal qualities * * * ' in connection with a controversial issue of public importance. See part E, Personal At-

tack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance', 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

"Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should Be Fun' Inquiry, 33 FCC 101, 107.

* * * * *

"In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

* * * * *"

The Petitioners having requested the Commission to reconsider this ruling, and having also requested "a ruling by the Commission on the constitutionality of the 'Fairness Doctrine' as applied to the instant situation" (R. 16-19) the Commission re-affirmed its ruling, and upheld the constitutionality of the Fairness Doctrine. (R. 20-25) With respect to the matter of payment by Cook, the Commission ruled (R. 22):

"'As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public

be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

* * * * *

"For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

* * * * *"

A formal order of the Commission, issued December 10, 1965, recited the addressing of the Commissioners' letter to the Petitioners. (R. 26) (Appendix B)

The case was heard in the Circuit Court of Appeals by Senior Circuit Judge Wilbur K. Miller and Circuit Judges Fahy and Tamm. The action of the Federal Communications Commission was affirmed. Circuit Judge Tamm filed an opinion, Circuit Judge Fahy filed a separate opinion, and Senior Circuit Judge Miller noted his non-participation in the consideration and decision of the case on the merits. (App. A, p. 44)

ARGUMENT

As Judge Tamm pointed out in his opinion (App. A, p. —) this case "constitutes the first direct court attack on constitutional grounds upon the Fairness Doctrine promulgated and executed by the Commission." In other words, the Circuit Court of Appeals has decided important questions of federal and constitutional law which have not been, but should be, settled by this Court. Without reference to all of the questions presented by the record, two points alone underscore the importance of those questions and the necessity for a decision by this Court.

The requirement that a broadcaster seek out any person who is alleged to have been personally attacked, furnish him a script, tape or summary of the broadcast, and grant him free time for reply, irrespective of his ability to pay, places an obvious and unreasonable burden upon the exercise of free speech. The broadcaster must act at his peril in carrying any program relating to a "controversial issue of public importance". Even though such a program may be received from a network, so that the broadcaster has no advance notice of its content, he may nevertheless be subject to a financial penalty if it contains a "personal attack" on any person. The penalty of course consists of the expense involved in locating the alleged subject of the attack, furnishing him with a script, recording or summary of the broadcast, and thereafter granting him free time in which to reply. The burden of such expenses, especially in the case of a small company such as that of the Petitioners, may be onerous. In any event, the chilling effect of such a rule upon free public discussion is plain.

The anamoly of the imposition of financial burdens and penalties on a broadcaster, in the circumstances of this case, is striking when considered in the light of *New York Times Company* v. *Sullivan*, 376 U.S. 254, *Associated Press* v. *Walker*, —— U.S. ——, 18 L.ed 2d 1094, and similar cases. Under the doctrine of those cases the person making a personal attack upon any public figure is immune from damages for libel unless it can be shown that he acted with actual malice. The Commission's stringent rule, however, would mulct the innocent broadcaster who carried the program containing the attack. The broadcaster is reminded by *New York Times Co.* v. *Sullivan* of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; at the same time, however, he is warned by the Commission that if he permits such debate over his facilities he may have to pay for it out of his own pocket. The inevitable effect is to stifle free discussion. Cf. *Speiser* v. *Randall*, 357 U.S. 513 (1958)

Second, the Fairness Doctrine as promulgated by the Commission is so vague and imprecise as to be constitutionally invalid. As this Court has held in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 (1963):

> "* * * Broad prophylactic rules in the area of free expression are suspect. See e.g., *Near* v. *Minnesota*, 283 US 697, 75 L.ed 1357, 51 S. Ct. 625; *Shelton* v. *Tucker*, 364 U.S. 479, 5 L.ed 2d 231, 81 S. Ct. 247; Louisiana ex rel. *Gremillion* v. *National Asso. for Advancement of Colored People*, 366 US 293, 6 L.ed 2d 301, 81 S. Ct. 1333. Cf. *Schneider* v. *State*, 308 US 147, 162, 84 L.ed 155, 165, 60 S.Ct. 146. Precision of regulation must

> be the touchstone in an area so closely touching our most precious freedoms."

The Commission has itself recognized the amorphus nature of its Fairness Doctrine in a Public Notice identified as the "Fairness Primer" and published in 29 Fed. Reg. 10415 (1964). The Commission there stated (29 Fed. Reg. 10416)

> "In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made."

Thus, by the Commission's own admission its rulings do not furnish the necessary guidance to broadcasters. Each case must depend upon its own facts and in each case a broadcaster must investigate and analyze the facts and then at his peril determine whether a program which he proposes to carry involves a "controversial issue" of "public importance", and if so, if it contains a "personal attack" on any individual. If he is wrong in his decision he pays with administrative expense and free time. Moreover, it is apparent that the Commission claims the right by interpretation to vary or extend its Fairness Doctrine. Thus, the requirement that broadcasters grant free time to persons who have been attacked, regardless of their ability to pay, was grafted on to the "Fairness Doctrine" in 1963. *Cullman Broadcasting Co., Inc.,* 25 Pike & Fischer Radio Reg. 895 (1963). In other words, the Commission in its discretion adds new provisions to its rule, so as to conform the rule with the facts and

the result desired. This we submit is precisely the type of broad prophylactic rule which this Court has condemned.

CONCLUSION

In conclusion, it is submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938.

RED LION BROADCASTING CO., INC., et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
RESPONDENTS

On Petition to Review and Set Aside an Order of the Federal Communications Commission

Decided June 13, 1967

Mr. Robert E. Manuel, with whom *Mr. Thomas B. Sweeney* was on the brief, for petitioners.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Assistant Attorney General Turner, Messrs. John H. Conlin,* Associate General Counsel, *Robert D. Hadl,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Before WILBUR K. MILLER, *Senior Circuit Judge,* FAHY* and TAMM, *Circuit Judges.*

The action of the Federal Communications Commission is affirmed. Circuit Judge Tamm files an opinion. Circuit Judge Fahy files a separate opinion. Senior Circuit Judge

---

* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

Miller notes his non-participation in the consideration and decision of the case on the merits.

TAMM, *Circuit Judge:*

I. Earlier Proceedings in This Court.

Argument of this case, after a full briefing schedule, was conducted before this panel of the court on September 26, 1966. With Judge Fahy dissenting, the panel concluded that the "declaratory rulings contained in the Commission's letters are not orders from which an appeal may be taken or judicial review sought," and dismissed petitioners' action. Thereafter, the United States and the Federal Communications Commission petitioned for an en banc rehearing of the case, and a majority of the court voted in favor of the granting of this petition to rehear. A majority of the court, then en banc, voted to vacate the opinions and judgment filed by the panel on November 22, 1966, and directed the assigned division to consider the petitioners' action upon the merits.[1]

II. The Issues Presented.

A prehearing stipulation approved by the court in a prehearing order dated March 9, 1965, defined the issues agreed to by the parties to be:

1. Whether section 315 of the Communications Act of 1934, as amended in 1959,[2] adopted the Commission's "Fairness Doctrine" as set forth in the Commission's 1949 *Report, Editorializing by Broadcast Licensees,*[3] and if so, whether section 315

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[1] See court order filed with this court's clerk on March 13, 1967.

[2] Equal Time Act, 47 U.S.C. § 315 (1962), *amending* 48 Stat. 1088 (1934).

[3] *Report of the Commission in the Matter of Editorializing by Broadcast Licensees.* 13 F.C.C. 1246 (1949).

constitutes an unconstitutional delegation of Congress' legislative function.

2. Whether the Fairness Doctrine, as set forth above, is unconstitutionally vague, indefinite, uncertain, and lacks the precision required when legislation which affects the basic freedoms guaranteed by the Bill of Rights is adopted.

3. Whether section 315, as stated in (1) above, violates the ninth and tenth amendments to the Constitution.

4. Whether the Fairness Doctrine violates the first and fifth amendments to the Constitution and, particularly, whether under the facts of this case the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the first and fifth amendments to the Constitution.

III. Identity of Petitioners and Factual Background Creating the Present Controversy.

Petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. In November 1964, petitioners broadcast a fifteen minute program by a Reverend Billy James Hargis as part of a program series entitled, *The Christian Crusade.* The program included a discussion of the 1964 presidential election and a book concerning the Republican campaign entitled, *Goldwater—Extremist on the Right,* written by Mr. Fred J. Cook. During the course of the program and as part of the broadcast, Reverend Hargis made the following statements concerning Mr. Cook.

"Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge

publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation* * * *. Now among other things, Fred Cook wrote for *The Nation* was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Exremist Of The Right.*"

Thereafter, Fred J. Cook wrote a letter to Radio Station WGCB inquiring whether Reverend Hargis had, in fact, made the above remarks. Cook requested time to reply to the Hargis remarks if they had, in fact, been made and specifically requested that the reply time be furnished at the expense of WGCB. In response, WGCB furnished Cook with its rate card so that he could arrange for the time he might wish to purchase and furnished him copies of letters which it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. A further exchange of letters occurred, after which, Cook filed a complaint with the Federal Communications Commission. In his complaint, Cook charged that Radio Station WGCB had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. Cook also charged WGCB was insisting upon payment from him for any reply broadcast. The Commission brought the complaint to the attention of Radio Station WGCB and requested an answer within twenty days. As

a result of this letter, additional letters were exchanged between the radio station and the Commission. To permit a full understanding of the resulting controversy, the pertinent letters are quoted below in their entirety as they were reproduced in the Joint Appendix filed by the parties in this case.

AM WGCB FM
BOX 88
RED LION, PENNA.

May 19, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Mr. Fred J. Cook;
Your ref. #8425-A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WCGB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not

available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to "sponsor" or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free

time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack "... on an individual's or group's honesty, character, integrity, or like personal qualities ..." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individ-

ual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission
Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

AM *WGCB* FM
BOX 88
RED LION, PENNA.

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Democratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation,* a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Centry Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action # 2331-65) that the Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.
By JOHN H. NORRIS
John H. Norris, *Vice President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation,* entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to*

WSOC Broadcast Co., FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committe program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its

station; the public interests requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in discusison of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the en-

closed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seeks clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.*, 276 F.2d 828, 829 (C.A. 5); *Fadell* v. *U.S.*, Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.*, 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.*, 243 F.2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation in the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

A formal order of the Commission, issued December 10, 1965, recited the addressing of the December 9 letter to the Reverend John H. Norris.

Petitioners thereafter filed in this court their petition to review the Commission's action. Petitioners' action constitutes the first direct court attack on constitutional grounds upon the Fairness Doctrine promulgated and executed by the Commission. It is to be noted, however, that this court has recently considered another case involving the Fairness Doctrine. See *Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

IV. Genesis of the Fairness Doctrine.

Mr. Justice Frankfurter, speaking for the Supreme Court in the landmark case of *National Broadcasting Co.*

v. *United States,* 319 U.S. 190 (1943), succinctly but accurately outlined and documented the origin, development, and necessity for federal regulation of radio, which culminated in the Radio Act of 1927.[4]

The initial concept of a fairness doctrine certainly had its beginning in this Act, which first required that radio stations allot for campaign purposes equal time to opposing political candidates.[5] Two years later, the Federal Radio Commission extended the coverage of this statutory provision to all discussions of issues of importance to the public, *Great Lakes Broadcasting Company* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 59 App. D.C. 197, 37 F.2d 993 (1930), *cert. dismissed,* 281 U.S. 706 (1930). Further implementation of the policy took the form of denial of licenses to radio stations using, or proposing to use, their facilities for the presentation of but one point of view. *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 App. D.C. 311, 62 F.2d 850 (1932), *cert. denied,* 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission,* 60 App. D.C. 79, 47 F.2d 670 (1931); *Chicago Federation of Labor* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 36 (1929), *aff'd;* 59 App. D.C. 333, 41 F.2d 422 (1930); *Great Lakes Broadcasting Company* v. *Federal Radio Commission, supra.*

The basic provisions of the Radio Act of 1927[6] were incorporated into the Communications Act of 1934,[7] within which was created the Federal Communications Commission.[8]

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[4] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

[5] *Id,* Sec. 18, at 1170.

[6] See note 4, *supra.*

[7] Act of June 19, 1934, ch. 652, 48 Stat. 1064.

[8] 47 U.S.C. § 151 (1962).

> "By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). (Footnotes omitted.)

Early in its existence, the Federal Communications Commission expressed approval of the policy established by the Radio Commission when, in *Young Peoples Association for the Propagation of the Gospel,* 6 F.C.C. 178 (1938), it denied application for a construction permit because of the applicant's policy of refusing to permit use of its broadcast facilities for the presenting of any viewpoint differing from that of the applicant.

Thereafter, the Commission adhered to the doctrine so established and, in fact, broadened the scope of its coverage, *Laurence W. Harry,* 13 F.C.C. 23 (1948); *WBNX Broadcasting Co.,* 12 F.C.C. 805 (1948); *Robert Harold Scott,* 3 P & F Radio Reg. 259 (1946); *United Broadcasting Co.,* 10 F.C.C. 515 (1945); *Mayflower Broadcasting Corp.,* 8 F.C.C. 333 (1941).

Chronologically at this point, the Commission initiated public hearings designed to reappraise and clarify the Fairness Doctrine. The hearings resulted in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, [hereafter referred to as the *Report*]. The *Report,* in effect, codifies earlier Radio Commission rulings, pre-*Report* rulings of the Federal Communications Commission, and the Commission's

accumulated experience in fairness problems, crystallized after public hearings into a basic statement of the then scope of the Fairness Doctrine. Characterizing the broadcasters as "trustees" (*Id.* at 1247), who operate their facilities for the public at large, the *Report* promulgated the requirement that broadcasters, while permitted to editorialize, must seek a reasonably balanced presentation of all viewpoints on public issues of controversial importance.

The *Report* considered and discussed in considerable detail the Commission's authority to administer the Act under the statutory mandate of serving only the public interest, convenience, and necessity, 47 U.S.C. §§ 307a, 309 (1962), as well as the statutory prohibition of the Commission's power of censorship, 47 U.S.C. § 326 (1962).

Detailed quotation of these facets of the *Report's* contents is unnecessary for understanding of the chronology being here outlined. It suffices to say that in sum total the *Report* concluded that licensees of broadcast facilities, authorized to use but not to own, prescribed channels of transmission for a limited time, were required to devote a reasonable percentage of their broadcasting time to the discussion of public issues of controversial importance. Moreover, the *Report* concluded that implicit in this requirement was the obligation to design and present this type of programming in such a manner that the public was afforded the opportunity to hear different and opposing positions and viewpoints on these public issues.

Noteworthy at this point is the fact that while the *Report* was based fundamentally upon the public interest standard and related statements in the Communications Act of 1934,[9] that Act substantially retained the provisions of the Radio Act of 1927[10] relating to the allocation

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[9] See note 7, *supra*.

[10] See note 4, *supra*.

of equal broadcast time to opposing political candidates for public office.

A congressional inquiry into the application and operation of the Fairness Doctrine was undertaken in 1959 and resulted in the amendment of section 315.[11]

This congressional action was triggered by the Commission's rulings in interpreting the application of the then section 315 and the Fairness Doctrine to newscasts of political events by Chicago television stations, *Lar Daly*, 18 P & F Radio Reg. 238, *aff'd on reconsideration*, 18 P & F Radio Reg. 701 (1959). Congressional consideration of proposed amendments to section 315 grew out of dissimilar bills introduced in the Senate[12] and the House of Representatives.[13] The differences in the bills passed by each chamber resulted in the designation of a conference committee.[14] The resulting conference accomplished the clarification of conflicting provisions of the proposed amendment of section 315 and the enactment of that section in its present phraseology.

Subsequent to the 1959 amendment of section 315, the Commission dealt with occurring problems and questions arising under the Fairness Doctrine on an ad hoc basis, as it had forecast in the *Report*, at page 1256. This experience with respect to fairness complaints resulted, on July 25, 1963, in the Commission's mailing to all broadcast licensees a Public Notice reiterating the obligation of all broadcasters to comply with the Fairness Doctrine, 25 P & F Radio Reg. 1899 (1963). This Public Notice stressed three factual situations arising under the Fairness Doctrine, including the licensee's obligation when a personal attack was broadcast, and specifically stated:

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[11] See note 2, *supra*.

[12] S. 2424, 86th Cong., 1st Sess. (1959).

[13] H.R. 7985, 86th Cong., 1st Sess. (1959).

[14] 105 Cong. Rec. 16160, 16375, 16588 (1959).

"(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer, RR 951, 953)." 25 P & F Radio Reg. at 1900.

The Public Notice further advised licensees that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, would be appropriate in better defining a licensee's responsibilities under the Fairness Doctrine. The resulting study culminated on July 1, 1964, in a Public Notice identified as the *Fairness Primer*, 29 Fed. Reg. 10415 (1964). Although the Commission had earlier defined and elaborated on its Procedures for handling fairness complaints, *Letter to Oren Harris*, 3 P & F Radio Reg. 2d 163 (1963), the *Primer*, after digesting its rulings on the Fairness Doctrine, reiterated the policy of dealing with each complaint on an ad hoc basis but also specifically set forth that in complaints warranting Commission consideration the licensee would be afforded an opportunity to take action or to comment upon the complaint prior to disposition of the matter by the Commission, 29 Fed. Reg., at 10416.

Especially of interest in the present proceeding is the fact that the *Fairness Primer* contained a separate section devoted to the personal attack principle, 29 Fed. Reg. 10420-1. In substance, this section required all licensees in broadcasts attacking an individual's or a group's integrity, character, honesty, or personal qualities, in connection with controversial issues of public importance to take all appropriate steps to afford the person or persons attacked the fullest opportunity to respond.

I will now discuss in the order in which they are enumerated in section II of this opinion, the several grounds upon which petitioners attack the Commission's action in the present case.

Discussion of the Four Stipulated Issues.

V. Did section 315 of the Communications Act of 1934, as amended in 1959, adopt the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report,* and if so, does section 315 constitute an unconstitutional delegation of Congress' legislative function?

In essence, petitioners charge that section 315 of the Act constitutes an unlawful delegation to the Commission of congressional legislative power. They argue, quoting from *Aptheker* v. *Secretary of State,* 378 U.S. 500, 514 (1964), "... precision must be the touchstone of legislation so affecting basic freedoms ..." and affix this quotation to their contention that the Fairness Doctrine infringes on constitutional guarantees secured by the Bill of Rights. Selecting from section 315 and from the Public Notice of July 1, 1964, *supra,* at 10415, such phrases as "reasonable opportunity," "sufficient time for full discussion" of "controversial issues of public importance," "substantial importance to the community," "contrasting views of all reasonable elements," "of sufficient importance to be afforded radio time," "primary controversy," "affirmative duty generally to encourage and implement the broadcast of all sides of controversial issues," "shades of opinion," petitioners argue that Congress has illegally delegated its legislative authority because of the absence of adequate standards or ascertainable criteria and that Congress cannot adopt and make a part of the statute regulations of the Commission which, in turn, fail to meet the "preciseness" required in legislation affecting basic freedoms, citing *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438 (1963).

The factual and legal elements involved in *Aptheker* v. *Secretary of State, supra,* can be immediately distinguished from those elements found in the present case. In *Aptheker,* which involved travel restrictions upon members of the Communist Party, the challenged statute governed knowing as well as unknowing conduct. It lacked "... criteria linking the bare fact of [Communist Party] membership to the individual's knowledge, activity or commitment." 378 U.S. at 511. The challenged statute created an "*irrebuttable presumption* that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States," 378 U.S. at 511, and excluded "other considerations which might more closely relate the *denial of passports to the stated purpose of the legislation,*" 378 U.S. at 511, (emphasis supplied) (footnotes omitted). The Supreme Court, then, was compelled to find that the statutory provision "*judged by its plain import and the substantive evil which Congress sought to control,* sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and was not patterned as a regulation "narrowly drawn to prevent the supposed evil." 378 U.S. at 514, (emphasis supplied).

In contrast, the court has in the present case, a statute and Commisison regulations growing out a licensing program addressed to the serving of the "public interest, convenience or necessity." 47 U.S.C. 307(a) (1962). The acceptance of this standard as a valid basis for the legislative grant of administrative power has been repeatedly upheld; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86, 89-91 (1953); *National Broadcasting Co.* v. *United States, supra; Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* at 138; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 276, 285 (1933); *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 24-25 (1932). Here there is no broad-reaching,

all-embracive statutory provision penalizing knowing as well as unknowing conduct. The court is dealing now with a set of reasonably concise and specifically enumerated prohibitions addressed to the evils they seek to guard against. See *Report, supra*, 47 U.S.C. § 315 (1962), and the *Fairness Primer, supra*. There are in this case no "irrebuttable presumptions," since provisions are afforded for the subjects of complaints to have an opportunity to comment or take action on a complaint before administrative action of the Commission. Most obviously the statutory provision, judged by its plain import and the substantive evil which Congress sought to control, is far removed from the stain of illegality found by the Supreme Court, speaking in *Aptheker, supra,* to exist in section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1951).

Turning to the substance of petitioners' argument under this heading, I observe the standard of evaluation of an exercise of its legislative power by the Congress to be whether "Congress has stated the legislative objective, has prescribed the method of achieving that objective . . . and has laid down standards to guide the administrative determination . . . ." *Yakus* v. *United States,* 321 U.S. 414, 423 (1944), and cases cited therein. There the Court also said:

> "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . These essen-

tials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .

"Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command." *Yakus* v. *United States*, at 424-5.

There appears to be no doubt but that the Supreme Court's references in *Yakus* to "an administrative officer" would apply equally and without qualification to a duly constituted administrative agency.

In reviewing the provisions of Title 47 U.S.C., I find clearly defined and explicitly enumerated statements of the legislative objectives, the enumeration of the method of achieving those objectives (*id est*, the creation of the Federal Communications Commission and the assignment to it of specific and enumerated duties, responsibilities, and obligations), and the establishment of standards to guide the administrative determinations. See section 309, "Application for license—Consideration in granting applications;" section 310, "Alien ownership as barring station license; assignment and transfer of construction permit or station license;" section 311, "Requirements as to certain applications in the broadcasting service—Notice of filing and hearing; form and contents;" section 312,

"Administrative sanctions—Revocation of station license or construction permit;" and other similar sections.

Within the framework of 47 U.S.C. §§ 151-319 (1962), I find a full and complete determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. Relating these specifically to the provisions of section 315, I find in this portion of the statute a permissible delegation to the Commission of the "determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly and legally empowering "the exercise of judgment." This allowable assignment of authority and responsibility, *Fairness Primer*, 29 Fed. Reg. 10415, constitutes a valid and proper formation of subsidiary administrative policy within the prescribed statutory framework.

Continuing to petitioners' charge that the Fairness Doctrine lacks the preciseness required in statutes "affecting basic freedoms." *N.A.A.C.P.* v. *Button, supra,* the Supreme Court, speaking in *National Broadcasting Co.* v. *United States, supra,* has effectively answered this question when it stated:

> "The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . .' *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285." 319 U.S. at 216.

Since the "public interest" is by statute and court decision a valid standard for the Commission's guidance, I find the necessary precision required by *Aptheker* in the situation arising in the present case. I conclude that the adoption by Congress of the Commission's Fairness Doctrine in its 1959 amendment of section 315 of the Communications Act of 1934 does not constitute an unconstitutional delegation of Congress' legislative function.

VI. Is the Fairness Doctrine unconstitutionally vague, indefinite, uncertain and/or lacking the precision which legislation affecting the basic freedoms guaranteed by the Bill of Rights requires?

Obviously, this question overlaps the discussion of the prior question, and petitioners' brief, as well as respondents' brief, duplicate in some measure the discussion of the present subheading and that of subheading V above, Again, from the starting point of the *Aptheker* case, *supra*, the petitioners, finding in their present situation a possible sanction, *id est*, the forfeiture of a valuable right to operate a radio station, seek solace from the fact that *Aptheker* involved penal sanctions. Claiming violation of their constitutional rights under the first and fifth amendments to the Constitution, petitioners argue that in applying the Fairness Doctrine to them, the Commission, having failed first to ascertain the truth of Cook's charges against them but requiring them, nevertheless, to afford Cook free time to reply to the Hargis broadcast, is abrogating their right to free speech in the dissemination of truth, if the Hargis charges against Cook are, in fact, true. Continuing their argument to the allegation of a due process infringement, petitioners contend that the vagueness in the Fairness Doctrine, as it is herein invoked against them, violates the first essential of due process of law in violation of the fifth amendment. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

As noted earlier, this case presents the first direct challenge to the constitutionality of the Fairness Doctrine; although we took passing notice of it recently by observing "... that adherence to the fairness doctrine is a *sine qua non* of every licensee." *Office of Communication of the United Church of Christ* v. *Federal Communications Commission, supra,* 123 U.S. App. D.C. at 343, 359 F.2d at 1009.

The first amendment extends, of course, to broadcasting, as well as to other media of expression. *National Broadcasting Co.* v. *United States, supra,* but "(u)nlike other modes of expression radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to government regulation." 319 U.S. at 226. This court has had not infrequent occasions to consider first amendment challenges to various actions of the Commission. Thus, in *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 123 U.S. App. D.C. 300, 352, F.2d 729 (1965), we rejected the contention that the imposition of a non duplication condition upon a licensee was violative of the first amendment. Earlier, speaking in *Carter Mountain Transmission Corporation* v. *Federal Communications Commission,* 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied,* 375 U.S. 951 (1963), we rejected appellant's contention that the first amendment guaranteed the use of all means of public communication free of restraint or denial imposed by the Commission's ruling. Similarly, in *Henry* v. *Federal Communications Commission,* 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), *cert. denied,* 371 U.S. 821 (1962), we denied a contention that the constitutional guarantee of free speech was abridged by a Commission ruling denying a license application upon the ground that the program proposals of the applicant were not designed to serve the needs of the proposed area. This court has made similar rulings in *Johnston Broadcasting Company* v. *Federal Communications Commission,* 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); *Bay State*

Beacon, Inc. v. *Federal Communications Commission*, 84 U.S. App. D.C. 216, 171 F.2d 826 (1948); and in *Simmons* v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F.2d 670 (1948), *cert. denied*, 335 U.S. 846 (1948).

It appears to be well documented, then, that because of its unique characteristics the courts have consistently held that regulatory action by the Commission, acting within the framework and provisions of the statutes embraced in Title 47 U.S.C., does not per se violate the first amendment.

Looking specifically to the actual operation of the Fairness Doctrine as applied to these petitioners in this present case, I observe, first of all, that petitioners are not prohibited from broadcasting any program which petitioners think suitable. Moreover, petitioners are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting. The latitude of petitioners' operation of their station insofar as programming is concerned is limited only by petitioners' discretion and good faith judgment. See *Commission's Policy on Programming*, 20 P & F Radio Reg. 1901 (1960) and the *Report, supra.*

The Fairness Doctrine impact arises, then, when in petitioners' exercise of their own judgment, they broadcast a program dealing with controversial issues of public importance. After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast. Such an attack, the Doctrine directs, necessitates the petitioners' affording the maligned victim an opportunity to respond. Does such an obligation arising under these conditions deprive petitioners of any right guaranteed by the first amendment? I think not.

The American people own the broadcast frequencies. Speaking through their elected representatives in Congress, they have established a program of licensing the temporary use of allocated frequencies to broadcasters who meet the standards established by Congress in Title 47 U.S.C. as administered thereunder by the Commission. The broadcasters, then, acquire no ownership of assigned channels but are authorized to use them for the service of the public interest, convenience, or necessity. In keeping with the public interest, I agree with the Commission that:

> "It would be inconsistent . . . to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307(a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, *may themselves make radio unavailable as a medium of free speech.*" *Report, supra*, at 1248. (Emphasis supplied.)

Although addressing itself to a Sherman Act situation involving newspaper services, the Supreme Court's admonition in *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), appears to me equally applicable with minor changes in syntax to the present case:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . That Amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

My conclusion in this regard is uninfluenced by petitioners' contention that the Commission in some manner has an obligation to first ascertain whether the complaint made to the Commission by Cook was "in fact true or false." There is, of course, no statutory requirement for such a finding. Additionally, it is my view that any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute an illegal exercise of a nonexistent authority. The basic concept of free speech is unfettered by any requirement that it be exercised only by those with a "right" viewpoint:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* pp. 571-572, [316 U.S. 568], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1948).

I reject the suggestion that the Commission has either the obligation, or even the authority, to make determinations of the right or wrong in factual disputes involving controversial issues of public interest.

The thrust of petitioners' challenge to the Commission action as an abridgement of their fifth amendment rights is rather difficult to specifically articulate. Briefing and

argument combine and interweave the vagueness argument indistinguishably about both the first and fifth amendments. Specifically, we are told that arguments advanced by petitioners in support of the questions discussed in part V of this opinion also support the allegation that the "vice of vagueness violates the due process clause of the Fifth Amendment . . . ." (Petitioners' brief at 17.) As I have set forth under part V of this opinion, I do not believe that either the Fairness Doctrine or the statutory provisions from which it flows are lacking in any required standards of preciseness. My view is that the statutes and the Doctrine are sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to penalties. Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1925). Moreover, broadcasters are protected against the abuse of power by the Commission by the procedural safeguards of Title 47 U.S.C., by the provisions of the Administrative Procedure Act,[15] and finally, by the right of appeal to the courts for relief from any final action claimed to be arbitrary or capricious. The petitioners are not deprived of due process by the operation of the Fairness Doctrine.

VII. Does section 315 violate the ninth and tenth amendments to the Constitution?

In four sentences in their brief (p. 20) petitioners assert that the Fairness Doctrine infringes upon the rights guaranteed by the ninth and tenth amendments. Relying upon *United Public Workers* v. *Mitchell*, 330 U.S. 74, 94 (1947), petitioners point out that there is therein an explicit pro-

[15] 5 U.S.C. §§ 1001-1011 (1950).

tection of the right of the people to engage in political activity. The argument then disclaims this case as representing any authority for "so restricting the rights of the people generally or the owners or users of media of communications such as radio or the press." The conclusion is drawn that the "prior restraint occasioned by the imposition of the 'Fairness Doctrine' infringes on the guarantee of the political rights retained by the people including petitioners herein and all paying users of Petitioners' radio facilities," and "the First Amendment's prohibitions clearly fall within the Tenth Amendment" as "powers not delegated to the United States by the Constitution are retained by the people." See petitioners' brief at page 20.

Again I encounter some difficulty in applying these general allegations to the facts in this case. Accepting *United Public Workers* v. *Mitchell, supra,* with some obvious limitations, for the principle announced by petitioners, I find little in the actual holdings of the Court as to the rights of federal employees under the Hatch Act which relates to the factual situation here before us. I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities, as I pointed out in some detail in part VI above. Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in those broadcasts. In political matters, the licensee alone has "the right and non-delegable duty of . . . acting reasonably to determine whether a program . . . is in the public interest." *Regents of New Mexico* v. *Albuquerque Broadcasting Co.,* 158 F.2d 900, 906 (10th Cir. 1947). While generally a licensee is responsible for all matter carried on his station, Congress has gone so far as to relieve him of this responsibility with respect to broadcasts by candidates for political office by stripping him of his power to censor. See section 315 and *Farmers Union* v. *WDAY,* 360 U.S. 529 (1959).

The Commission, in supporting its action in this case, construes petitioners' challenge under this point as being addressed to its requirements imposed on the licensees after the personal attack, with special reference to the mandated granting of cost-free time to the victim to respond as his financial circumstances require. If this is the thrust of petitioners' charge, I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one. The broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust. There remains to the licensee the right, in the exercise of good faith discretion, of utilizing a paying spokesman to respond to a personal attack if one is available. But:

> ". . . [W]here the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (and does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee —and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation." (Emphasis in original.) *Cullman Broadcasting Co., Inc.*, 25 P & F Radio Reg. 895, 896 (1963).

I conclude that there is no abridgement of petitioners' rights in the application of the Fairness Doctrine to their activities in this case. In so doing, I have considered the entire record in an effort to preceive and understand the petitioners' ninth amendment claim, despite the vague and general nature of their brief upon this point. I observe further in this regard the paucity of cases defining, enumerating, or interpreting ninth amendment rights. Mr.

Justice Goldberg, speaking in a concurring opinion in *Griswold* v. *Connecticut*, 381 U.S. 479 (1964), cites but three Supreme Court cases treating of the ninth amendment during the entire period of the Court's existence, supplemented by two "see also" citations. 381 U.S. at 490-1.

Mr. Justice Stewart, while dissenting in *Griswold, supra*, pointed out that:

> "The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' *United States* v. *Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual states." 381 U.S. at 529-30.

I apply to the petitioners' ninth amendment[16] argument Mr. Justice Stewart's statement in *Griswold, supra*, at 529, "but to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."

The thrust of the tenth amendment argument attempts to place section 315 within the ambit of powers not delegated to the United States by the Constitution. The threshold weakness of this contention is that the Supreme Court has affirmatively held that the broadcasting system established by Title 47 U.S.C. is a proper exercise of the constitutional power of Congress over commerce, *National Broadcasting Co.* v. *United States, supra*, and in enacting Title 47 U.S.C., Congress must be deemed to have exer-

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[16] For additional citations to discussions of the origin of, reasons for, and applicability of the ninth amendment, see *Griswold*, 381 U.S. 489, 490, 491, and footnotes thereon.

cised its power within constitutional limitations. *Sablowsky* v. *United States*, 101 F.2d 183 (3rd Cir. 1938). I have discussed in part V of this opinion the right of Congress, under established precedents, to delegate the administration of statutory provisions to agency determination. It follows, then, that Congress having acted herein under specifically identified constitutional power, approved by the Supreme Court, properly delegated execution of its statutory mandate to the Commission. Therefore, there exists in this case no transgression of any power reserved to the states or the people. "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments must fail." *United Public Workers* v. *Mitchell, supra*, at 96.

VIII. Does the Fairness Doctrine impair free speech in violation of the first amendment by imposing a prior restraint upon the expression of views, arguments, and opinions by petitioners, as well as by all other owners of radio stations, and upon those who pay for the use of such facilities?

Beginning with citations and irrefutable quotations relating to the purposes, the meaning, and the breadth and scope of the Bill of Rights, and especially of the first amendment, from *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Board of Education* v. *Barnett*, 319 U.S. 624 (1943); *United States* v. *Paramont Pictures, Inc.*, 334 U.S. 131 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Grosjean* v. *American Press*, 297 U.S. 233 (1936); *Near* v. *Minnesota ex rel Olson*, 283 U.S. 697 (1931); and *McIntire* v. *William Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the petitioners contend that the Fairness Doctrine, measured against the principles of those cases, imposes a direct and previous restraint upon the right of free speech guaranteed by the first amendment. This results, say petitioners, from the Doctrine's restraining a licensee from

speaking out editorially on issues of public importance except on condition that he seek out and grant free time to another to express oppositorial views. Further restraint arises, they say, because an owner of a station "may not permit his facilities to be used by a paying citizen to speak out in opposition to governmental action or policy unless such owner makes available free time commensurate with the paid time to voice the contrary view." It follows, say petitioners, that the Fairness Doctrine creates "previous restraint [and the] fear of subsequent punishment" through danger or threat of the forfeiture of the licensee's license. Beyond this the petitioners further argue they are forced by the Doctrine to surrender "as a pre-condition to the obtaining of a radio station license," their right of freedom of speech and are, finally, compelled to assume the "unlawful obligation" of becoming the "first censor" of all public interest broadcasts at the risk of ultimate loss of their broadcasting license at renewal time if their censorship is not to the liking of the Commission.

I begin, then, with an examination of the reasons advanced by the respondents for the formation and operation of the Doctrine:

> "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [constitutional] rights." *Schneider* v. *State,* 308 U.S. 147, 161 (1939).

First, then, I set forth in the several following paragraphs the respondents' reasons, advanced in brief and oral argument, for the regulations constituting the Fairness Doctrine.

Radio broadcasters, state the respondents, by utilizing the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry

on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, *id est,* the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. The first amendment establishes an informed electorate as the foundation stone of a democracy.

> "In presenting programs dealing with controversial issues of public importance, the fairness doctrine imposes upon licensees the affirmative obligation to afford reasonable opportunity for the expression of conflicting viewpoints. As such, it is reasonably related to the statutory scheme which provides that licenses are issued for limited times to persons who act not in their own private interest, but as 'trustees' for the public's interest in 'the larger and more effective use of radio,' 47 U.S.C. 303(g)." [17] Respondent's brief at 21.

The "public interest," continue the respondents, having been consistently sustained by the courts as a valid standard to guide the Commission in the exercise of its prescribed duties, has been made more precise by the incorporating into the Communications Act of 1934 of the fairness principle. A broadcast station, not being a common carrier, and having both the duty and the right of determining whether a controversial program is in the public interest, must, after having exercised that determination by broadcasting a particular program, in the public interest afford equal opportunity for the broadcast of the other side of that controversial issue. This burden exists equally well

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[17] 47 U.S.C. § 303(g) (1962) reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

when the initial broadcast consists of a personal attack upon a person or organization. The crucial consideration is the public interest in hearing both sides. The licensees' obligation to present both sides does not arise from the factual truth or falsity of the broadcast, because in the application of the Doctrine the ultimate determination of the merits of the issue will be made by the general public for whose information, presumably, the initial broadcast was originally made.

> "[The freedom of speech guaranteed by the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (L. Hand, J.) (S.D.N.Y. 1945), *aff'd*, 326 U.S. 1 (1945).

Against this backdrop and the entire record, I do not find in this case the existence of any "prior or previous restraint." Concise or even broad definitions of the factual situations or practices which constitute a prior restraint are non-existent within the wide scope of the Court's review of first and fourteenth amendment cases. Certainly, however, any type of Government censorship imposed prior to permitted publication is an abrogation of first amendment guarantees. *Joseph Burstyn, Inc.* v. *Wilson, supra; Schneider* v. *State, supra; Grosjean* v. *American Press Co., supra.* Similarly, a licensing program operating in fact as a censorship program constitutes a first amendment violation. *Burstyn, Inc.* v. *Wilson, supra.* Accepting readily the obvious fact that other situations could constitute a prior restraint, I confine my discussion to the facts in the present case. The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of program material, program substance, program format, and identity of program

personnel is bounded only by their own determination of the public interest appeal of their end product. They are not required to submit any broadcast material to the Commission, or any other Government agency, prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint. It seems almost superfluous for me to have to point out that section 326 specifically prohibits any censorship action on the part of the Commission.

Turning, then, to the licensing scheme incorporated in Title 47 U.S.C., I observe readily that no provision whatsoever requires the license applicant to waive, forego, or sacrifice the liberty to discuss, when licensed, publicly all matters of public concern. Consideration of public interest, convenience, and necessity are alone the prescribed existing and operational standards for eligibility for issuance of a broadcast license. Although petitioners allege that a fear of punishment may constitute a de facto restraint upon the exercise of their free speech guarantees through a denial of their ultimate renewal application, I point out—as I have done before in this opinion—that the remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from any illegal, arbitrary, or capricious conduct on the part of the Commission. Petitioners have full access to the ground rules governing the Fairness Doctrine, since they have been printed in the Federal Register, 29 Fed. Reg. 10416, and furnished to all broadcast licensees. Broadcasters have full opportunity to answer any complaint against their station, *Letter to Oren Harris, supra,* and may request a ruling from the Commission if they are in doubt whether a particular set of facts is within the Doctrine. *Cullman Broadcasting Co., supra.* Finally, I observe that the Commission has recorded its position against the invocation of sanctions against any broadcaster for an honest mistake in judgment. *Report, supra,* at 1246 and

Capitol Broadcasting Co., 2 P & F Radio Reg. 2d 1104 (1964).

Weaving together the several threads of discussion presented in this section of this opinion, I conclude that there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens," *Grosjean* v. *American Public Press, supra,* at 249. Having found no violation de jure or de facto of petitioners' rights, I am absolved from further consideration, at least in this case, of the reasons advanced by the Commission for the existence of the doctrine (referring back, of course, to the doctrine of *Schneider, supra*).

Conclusions

1. 47 U.S.C. § 315 (1962) adopted the Commission's Fairness Doctrine, as set forth in the Commission's 1949 *Report, supra,* and in so doing, the Congress did not commit an unconstitutional delegation of its legislative function.

2. The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights.

3. Neither 47 U.S.C. § 315 (1962) nor the Fairness Doctrine is violative of the ninth or tenth amendments to the Constitution.

4. Under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal

attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments.

The Commission action under review is

Affirmed

FAHY, *Circuit Judge:* I concur in the result reached by Judge Tamm and in general with his reasoning, without committing myself to all details of the opinion. For example, I have doubts that the fairness doctrine "recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast." I agree with the Commission without finding it necessary to accede to this position.

Moreover, I agree with the Commission that a reply to a personal attack is not conditioned upon the ability of the licensee to obtain paid sponsorship for the reply. As to the procurement of sponsorship I need go no further than the case of a personal attack.

WILBUR K. MILLER, *Senior Circuit Judge,* did not participate in the consideration and decision of this case on the merits, set forth in the foregoing opinion.

18

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

77280 Public Notice—B

December 10, 1965

Report No. 5810

BROADCAST ACTION

The Commission, by Commissioners Henry (Chairman), Hyde, Bartley, Lee, Cox, Loevinger and Wadsworth, took the following action on December 9. Commissioner Hyde abstained from voting; Commissioner Bartley dissented to issuance of the letter as presently written because it is too long and inaccurate; Commissioner Loevinger concurred in the ruling but not in the letter.

RESPONSE TO WGCB, RED LION, Pa., REQUEST FOR RECONSIDERATION OF FCC FAIRNESS DOCTRINE RULING ON FRED J. COOK COMPLAINT

The Commission addressed the attached letter to Rev. John H. Norris, vice president of Red Lion Broadcasting Co., Inc., licensee of AM station WGCB, Red Lion, Pa., in response to his request for reconsideration and clarification of the Commission's October 8 fairness doctrine ruling on complaint by Fred J. Cook, of Interlaken, N. J., concerning a Billy James Hargis "Christian Crusade" program broadcast by WGCB in November 1964.

Attachment

APPENDIX B

13

FCC 65-1103 76921

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation*, entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report*, applies to a broadcast

licensee irrespective of the position which may be taken by other media on the issue involved, and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.*, FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media,

14

such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute com-

pliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion

of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that

under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seek clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.*, 276 F. 2d 828,

829 (C.A. 5); *Fadell* v. *U.S.*, Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.*, 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.*, 243 F. 2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discuss the constitutionality of the fairness doctrine generally in the Report on Editoralizing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate

spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6.

17

Viewed against these fundamental precepts, our ruling is, be believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission
Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in these three consolidated cases on September 10, 1968.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–48) is not yet officially reported. The Commission's memorandum opinions and orders adopting and revising the rules involved (Apps. C, D and E, *infra*, pp. 50–77) are reported at 32 F.R. 10303, 32 F.R. 11531 and 33 F.R. 5362.

324-010—68——1

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (App. B, *infra*, p. 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission has adopted rules codifying its policy requiring that a broadcast station afford an opportunity for reply to any person subjected to certain types of personal attack and to any political candidate against whom the station has editorialized. This case presents the question whether these rules and related policies are consistent with the First Amendment.

STATUTES AND REGULATIONS INVOLVED

Sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j), 303(r) and 315, are set forth in Appendix F, *infra*, pp. 79–80. The rules under review are also set forth in Appendix F, *infra*, pp. 81–83.

STATEMENT

On July 5, 1967, the Federal Communications Commission adopted rules, subsequently revised on August 2, 1967, and March 27, 1968, to codify the principles previously set forth in policy statements and *ad hoc* rulings with respect to the responsibility of broadcast stations to afford reply time when their facilities are used to attack persons or groups or when they editorialize on candidates in political campaigns.

The "personal attack" rule provides that if an attack is made upon the "honesty, character, integrity

or like personal qualities" of an identified person or group in connection with discussion of a controversial issue of public importance, the licensee must notify the person or group attacked, transmit a script or tape of the attack (or an accurate summary if a tape is not available), and afford "a reasonable opportunity to respond over the licensee's facilities." Among certain exemptions from these requirements are attacks made in newscasts, news interviews and on-the-spot coverage of news events (including commentary or analysis, but not editorials, in such programs). In these exempt categories, notice and opportunity to respond need not be given to the person or group attacked if the licensee presents the contrasting viewpoint on the issue involved.

The "political editorial" rule provides that if a licensee editorializes with respect to political candidates, it must provide time for reply by any candidate opposed or not supported; it may require that this reply be made by a spokesman rather than the candidate himself, in order to avoid the creation of new reply rights in other candidates under Section 315 of the Communications Act, 47 U.S.C. 315. If such an editorial is broadcast within 72 hours before an election, notice must sufficiently precede the broadcast to give any candidate not supported "a reasonable opportunity to prepare a response and to present it in a timely fashion."

The principles underlying these rules had evolved as one aspect of the Commission's general Fairness Doctrine, which is based upon the public's right to be informed on public issues. The Commission early

enunciated the policy that the several provisions of the Communications Act relating to enhancement of the public interest require a licensee to afford reasonable opportunity for the discussion of contrasting views on issues of public importance that he chooses to cover. *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1250 (1949). This policy was confirmed by Congress in a 1959 amendment to the Communications Act.[1] In 1963, the Commission issued a policy statement setting forth the general substance of the "personal attack" principles now incorporated in the rules (25 Pike & Fischer R.R. 1899), and in 1964 it issued a "Fairness Primer" (29 F.R. 10415). However, prior to the promulgation of the rules here in question, the Commission had no generally available means of enforcing the policies of the Fairness Doctrine other than the ultimate sanction of refusal to renew a station's license whenever it might expire.

The Commission believed that codification of the "personal attack" principles in rule form was desirable in order to emphasize and define more precisely the obligations of licensees and to make available the more suitable direct sanctions of monetary forfeitures

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[1] In amending Section 315 of the Communications Act to exempt certain news programs from the requirements of that section for "equal time" for candidates for public office, Congress further provided that:

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557.

under 47 U.S.C. 503(b) in cases of willful or repeated noncompliance. The Commission had found that the procedures it had specified were not always followed even when flagrant personal attacks occurred (App. C, pp. 51–52, 55). It considered codification of the principles on political editorials similarly appropriate.

The new rules were the subject of three separate petitions for review below, in Case No. 16369 by Radio Television News Directors Association, *et al.*, in Case No. 16,498 by Columbia Broadcasting System, Inc., and in Case No. 16,499 by National Broadcasting Company, Inc.[2] The cases were consolidated by order of October 24, 1967.

The court of appeals held that the rules unreasonably restrict free speech and set aside the Commission's order adopting them. It found that the requirements of notice and opportunity for reply impose excessive economic and practical burdens on the broadcasting of views on political candidates and controversial issues of public importance. In the court's view, these requirements, together with "the omnipresent threat of suffering severe and immediate penalties" for violations of the rules would lead to licensee self-censorship (App. A, pp. 28–30, 35–36). The court of appeals found "an even greater threat of Commission censorship" in what it considered insufficient specificity as to when the obligation of notice and opportunity for reply arises, compelling licensees to consult the Commission to determine their obligations in borderline

[2] The latter two petitions were transferred from the Second Circuit pursuant to 28 U.S.C. 2112.

cases (App. A, pp. 31–32). The court declined to accept any distinction between the broadcast press and the printed press with respect to the obligations that might be imposed (App. A, pp. 38–43). In view of its decision on the First Amendment question, the court did not decide the question whether Congress had authorized the Commission to promulgate such rules (App. A, p. 46).

The court of appeals' decision involved a direct disagreement with the decision of the Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 381 F. 2d 908, certiorari granted, 389 U.S. 968, upholding an *ad hoc* ruling by the Commission upon a complaint that a station failed to comply with the Fairness Doctrine in a "personal attack" situation. In *Red Lion,* the Commission had advised the station that it was obligated to offer the person attacked an opportunity to respond, and had improperly failed to inform him of the attack and send him a tape or transcript of the broadcast. Although this ruling bore no direct sanctions, the Court of Appeals for the Seventh Circuit viewed it as "essentially an anticipation of an aspect of the personal attack rules which are here being challenged" and thus considered it as an incorrect ruling (App. A, p. 38).

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit on a question of major importance in the administration of the Communications Act. The decision of that court in *Red Lion Broadcasting Co., Inc.* v.

Federal Communications Commission, 381 F. 2d 908, certiorari granted, 389 U.S. 968, sustained the constitutional validity of the Fairness Doctrine and of the Commission's ruling on the requirements that Doctrine created in a specific personal attack situation. In this case, the Court of Appeals for the Seventh Circuit has held that rules codifying the Fairness Doctrine as applied to personal attacks are unconstitutional, stating its disagreement with *Red Lion* and setting up constitutional standards unlikely to be met by any conceivable rules.

Despite the conflict between the opinions of the courts of appeals, the decision of this Court in *Red Lion* will not necessarily determine the issues in the present case. Implementation of the Commission's personal attack policy by rules of general applicability and direct enforceability might be considered as involving questions distinguishable from those raised by the issuance of an *ad hoc* ruling bearing no direct sanctions. Moreover, the present case also involves the Commission's implementation of its reply policy on political editorials, which may not involve some of the issues involved in the policy on personal attacks. Accordingly, it is now appropriate that both cases be before the Court so as to permit full consideration of these issues.[8]

It is evident that this case, like *Red Lion*, presents questions of major importance in the administration of the Communications Act that should be settled by

[8] The Court last Term postponed oral argument in *Red Lion* pending the decision of the court of appeals and the filing of any petition for certiorari in this case. 390 U.S. 916.

this Court. Although the court below stated that it was "not prepared" to hold the general Fairness Doctrine unconstitutional, its reasoning can only be read as an expression of serious doubt that the Doctrine could be properly applied in other contexts. Indeed, the approach taken by the court below may amount to a questioning of the validity of the provisions of Section 315 of the Act requiring stations to make equal time available to candidates for political office.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1968.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

September Term, 1967—April Session, 1968

Nos. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

September 10, 1968

Petitions for Review of Orders of the Federal Communications Commission

Before CASTLE, *Chief Judge,* KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This review raises the question of the constitutionality of the Federal Communications Commission's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for radio and television stations [1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967, (adopted on July 5, 1967), which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc., (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to

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[1] These petitioners are Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

[2] Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

[3] The rules as set forth in the July 10 order appear in the appendix to this opinion.

[4] Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations favored the Commission's rules.

codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror*[5] ruling as to station editorials endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules, however, only if made "during the presenta-

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[5] *Times-Mirror Broadcasting Co.* (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the "'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

"Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candiate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast." *Id.*

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." *Id.* at 406.

tion of views on a controversial issue of public importance."

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the *Report of the Commission in the Matter of Editorialization by Broadcast Licensees,* 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Com-

[6] The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

"It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.*" (Emphasis added.)

mission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

Because "the procedures specified [in prior Commission rulings][8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second,

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[7] That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[8] In particular, The Commission referred to the Public Notice of July 26, 1963; *Controversial Issue Programming*, F.C.C. 63-734 and Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said that the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to the alleged discouragement of controversial issue programming, the Commission responded:

> Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or

> editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, *i.e.,* the personal attack or the licensee's editorial.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the *Report on Editorialization,*" 13 F.C.C. 1246 (1949) and the decision in *Red Lion Broadcasting Co., Inc.* v. *FCC,* 381 F. 2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967).[9]

Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter exemption was thought to be appropriate in view of the "equal

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[9] On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922 (1968).

[10] This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

opportunities" provision of 47 U.S.C. § 315 [11] with respect to broadcasts by political candidates.

The Commission's purposes in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond." [12] The response can be made through a spokes-

[11] In pertinent part, section 315 reads:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection."

[12] The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

"The phrase: 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

man of the candidate's choice.[13] A twenty-four notification requirement was imposed because "time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial." In those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

On August 7, 1967 the Commission[15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to

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[13] The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunity' cycle" which might be initiated if the candidate himself responded.

[14] The rules issued on July 10, 1967 were to become effective on August 14, 1967.

[15] Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

[16] The respective petitions for review were supplemented to take account of the August 7 order.

[17] The amendment as set forth in the August 7 order appears in the appendix to this opinion.

these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commision exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number, * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee, having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request, and on March 29, 1968, the Commission[19] issued a Memorandum

[18] The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

"[W]e are fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve."

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stayed pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commission's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

[19] Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commissioner's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision [20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature," [21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting

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[20] The amendment as set forth in the March 29 order appears in the appendix to this opinion.

[21] The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

"Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, 'when, during the presentation of views on a controversial issue of public importance * * *,' the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion."

the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to section

[22] See note 11, *supra*.

315],"[23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In addition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his facilities to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that the necessity of airing replies will have in dis-

[23] Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

"We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also."

[24] RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

placing previously scheduled programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually responsible for all the material which he broadcasts.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commission's offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret

vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This nonexistent constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fash-

ion that under the rules as amended, there is no "possibility of inhibition" of licensees.

We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to assess claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 432, 433 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), delineated the Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the

[25] Other decisions in which the Supreme Court explored the implications of *New York Times* are: *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) (public official's defamation action after televised speech critical of him); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) (public figures' libel action after printed

New York Times case, a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less stringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278.

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articles critical of them); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); *Mills* v. *Alabama*, 384 U.S. 214 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

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[26] The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

[27] The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairess Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers[29] could be determined on the basis controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

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[28] See note 6, *supra*.

[29] The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

"(b) Violation of rules, regulations, etc.; * * *

"(1) Any licensee or permittee of a broadcast station who—

* * * * * *

of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal

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"(B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States,

* * * * *

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter."

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

"(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

* * * * *

for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

* * * * *

"(b) Cease and desist orders.

"Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[20]

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[21]

[20] In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

[21] In *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966), the Supreme

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act.[32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if

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Court discussed the vanguard role of the press in the following language:

"Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

[32] 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[33] See text *supra* at 7.

the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree."[34]

We agree with the petitioners that such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court)[35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist."[36] In its

[34] "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

[35] The latest revision was prompted, according to an Assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

[36] On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the *Fairness Primer*, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 29 Fed.

memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "The rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity or character of an identified person or group an issue in that discussion." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quote language is that there is little, if anything, distinguishing "editorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a

Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

324-010—68——3

distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labelled station or network editorial" still subject to the rules.[37]

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even

[37] A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

[38] There is some question whether the Commission's action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

possible inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, * * * Such is-

[39] For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. Wood, Electronic Journalism, 46–49 (1967).

> sues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In *Smith* v. *Califorina,* 361 U.S. 147, 154 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in *Red Lion Broadcasting Co., Inc.* v. *FCC,* 381 F. 2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967). *Red Lion* concerned the challenge by a radio station licensee of a Commission order requiring the licensee

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[40] The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commission's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack "* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *" in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F.2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion*, sustaining the Commission's order, inasmuch as we think that the order was esentially an anticipation of an aspect of the personal attack rules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the

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[41] See page 82, *supra*.

[42] In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart

First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest."[42] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the

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from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 *Report on Editorializing*. Those two general paragraphs, written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of *New York Times* and its progeny.

[42] *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 479 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers.[45] In most major metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

[44] Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

[45] In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U.S. Bureau of the Census, Statistical Abstract of the United States: 1967, nos. 737, 746 (88th ed.).

[46] RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967*; Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue*.)

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second, the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can be owned

by anyone is simply to indulge in fantasy."[47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).[48] Accordingly, the Commission cannot im-

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[47] Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 1952 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion*.

[48] The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

pose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of

a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle."[49] (Emphasis added.) When this disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severly with a minority of licensees who engage in "willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is as-

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[49] The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the rules, thereby chilling the exercise of his first amendment rights.

[50] The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(f) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

> sumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U.S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful consitutionality," *Greene* v. *McElroy,* 360 U.S. 474, 507 (1959), is lacking. And even if it could not be determined that rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in *Green* v. *McElroy.*

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing *National Broadcasting Co. Inc.* v. *United States,* 319 U.S. 190

(1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman,

or persons associated with the candidate in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide new[illegible]nt (but the provisions shall be

applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

Tuesday, September 10, 1968

No. 16369, 16498, 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions for Review of Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge,* Hon. ROGER J. KILEY, *Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge.*

This cause came on to be heard on the petitions for review of orders of the Federal Communications Commission, and the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Federal Communication Commission's order adopting the personal attack and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day.

APPENDIX C

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

IN THE MATTER OF AMENDMENT OF PART 73 OF THE RULES TO PROVIDE PROCEDURES IN THE EVENT OF A PERSONAL ATTACK OR WHERE A STATION EDITORIALIZES AS TO POLITICAL CANDIDATES

Memorandum Opinion and Order

1. On April 6, 1966, the Commission adopted a notice of proposed rule making (FCC 66–291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This notice was published in the FEDERAL REGISTER of April 13, 1966 (31 F.R. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20, and July 5, 1966, respectively (31 F.R. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), et al.,[1] Cape Fear Telecasting, Inc., Colo-

[1] On July 8, 1966, Bedford Broadcasting Corp., et al., submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jesse Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 CFR 1.415(d).)

rado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., et al., Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer Broadcasting Co., Trigg-Vaughn Stations, Inc., WTBC, Inc., and WPSD–TV, generally in opposition to the rules. Comments favoring the rules were received from the American Civil Liberties Union,* Joseph H. Chislow, International Typographical Union (AFL–CIO), Laborers' International Union of North America (AFL–CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL–CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forefeitures (section 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of

*The informal comments submitted by the A.C.L.U. reflect an apparent misreading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues * * *" In fact this is the situation expressly covered by the proposed rules.

course, pursuant to section 503(b) of the Act, only the willful or repeated violation, of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See paragraph 10, infra.

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 FCC 1246 at 1249 (1949), "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed, rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." Ibid. The Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of section 315 (a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 Report that "elementary consideration of fairness may dictate that time be allocated to person or group which has been specifically attacked over the station * * *" 13 FCC 1252. The standard of fairness

[3] The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, infra, within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 Report, supra, 13 FCC 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the Report on Editorialization, 13 FCC 1246–1270. "We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the report." Letter to John H. Norris (WGCB), 1 FCC 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in Red Lion,* concluded "that there is no abrogation of the petitioners' [licensees'] free speech right. * * * I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general dicussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' Grosjean v. American Public Press, supra at 249." Red Lion, supra, at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials

* Affirmed sub. nom., Red Lion Broadcasting Co., Inc. v. F.C.C., Case No. 19,938, D.C. Cir. (June 13, 1967).

on political candidates. They simply provide that where he chooses to make such presentations he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely, operation by a licensee limited to informing the public of only one side of these issues; i.e., the personal attack or the licensee's editorial.[5]

6. The addition of § 73.123 (a), (b) (and also 73.300–FM; 73.598—Educational FM; 73.679–TV of identical language) to the rules serves to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine. Report on Editorialization by Broadcast Licensees, 13 FCC 1246, 1258 (1949); Clayton W. Mapoles, 23 Pike & Fischer, R.R. 586 (1962); Billings Broadcasting Co., 23 Pike & Fischer, R.R. 951 (1962). "Thus, we have repeatedly stated that when a licensee in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked * * * either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.' Public Notice of July 26, 1963; Controversial Issue Programming, FCC 63–734 (emphasis supplied)." Springfield Television Broadcasting Corp., 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the

[5] In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 Report, supra, 13 FCC at 1251.

licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See Clayton W. Mapoles, 23 Pike & Fischer, R.R. 586 (1962); Billings Broadcasting Co., 23 Pike & Fischer, R.R. 951 (1962); Times-Mirror, 24 Pike & Fischer, R.R. 404 and 407 (1962); and Springfield Television Broadcasting Corp., 4 Pike and Fischer, R.R. 2d 681, 685 (1965); Radio De Land, Inc. (WJBS), 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 1963 Public Notice (FCC 63–734) and the 1964 Fairness Primer, supra. Despite such notification and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issue of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do the detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversy or * * * slant or dis-

tort the presentation of such news." Report on Editorialization, supra.

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. Capitol Broadcasting Co., 2 Pike & Fischer, R.R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with the rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

[T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. Applicability of the Fairness Doctrine in the Handling of Controversial Issue of Public Importance, Public Notice of July 1, 1964, footnote 6.

Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See Letter to Pennsylvania Community Antenna Television Association, Inc., 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the notice

of proposed rule making, we recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations.[6] As we stated in the notice of proposed rule making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler

[6] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Co.'s comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

or a Communist). Statements that the rules will discourage, rather than encourage, controversial programing ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programing by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, supra. Further we do not perceive any discouragement to controversial issue programing, except for a licensee who wished to present only one side of such programing—namely, the personal attack and not the response by the individual attacked.

10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issue, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond, rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast li-

censee. If an unawareness of this obligation presently exists among licensee despite the Commission's language in Mapoles, Billings, Times-Mirror, Springfield Television, the public notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than 1 week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the 1-week period. See paragraph 9, supra.[7] This 1 week outer time limit does not mean that such a copy should not be sent earlier or indeed, before the attack occurs, particularly where time is of the essence.

Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Com-

[7] As we stated in the notice of proposed rule making, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

mission's interpretive rulings based on specific factual situations.[8]

13. As we pointed out in the notice, following present policy (public notice of July 1, 1964 (Fairness Primer), FCC 64-611, 29 F.R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of section 315—and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a); public notice of July 1, 1964, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 F.R. 10415 (1964).

14. Finally, subsection (e) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice including, if the licensee so

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[8] Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc. v. FCC, *supra*. In view of our ruling, this is a matter not covered by the rule.

agrees, himself. The language of subsection (c) has been altered from that appearing in the notice of proposed rule making (FCC 66–291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. See, Final Report of the Senate Committee on Commerce, S. Rep. No. 944, 87th Cong., second sess., Part 6, page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date; i.e., less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have

accordingly made this requirement explicit in a proviso to subsection (c).

16. As in the case of the personal attack subsection the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. Times-Mirror, 24 Pike & Fischer, R.R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in section 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

18. *Accordingly, it is ordered,* That the rules contained below are adopted, effective August 14, 1967.

(Secs. 4, 303, 315, 48 Stat. as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: July 5, 1967.

Released: July 10, 1967.

FEDERAL COMMUNICATIONS COMMISSION,[10]

[SEAL] BEN F. WAPLE, *Secretary.*

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[9] Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

[10] Dissenting statement of Commissioner Bartley and concurring statement of Commissioner Loevinger filed as part of original document; Commissioner Wadsworth absent.

In Part 73, §§ 73.123, 73.300, 73.598, and 73.679 all to read identically are added to read as follows:

§ 73.____ Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or

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NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, section 315(a) of the Act (47 U.S.C. 315(a)); public notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

APPENDIX D

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

IN THE MATTER OF AMENDMENT OF PART 73 OF THE RULES TO PROVIDE PROCEDURES IN THE EVENT OF A PERSONAL ATTACK OR WHERE A STATION EDITORIALIZES AS TO POLITICAL CANDIDATES

Memorandum Opinion and Order

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See section 315(a) of the Communications Act of 1934, as amended; Applicability of the Fairness Doctrine In The Handling Of Controversial Issues of Public Importance, 29 F.R. 10416. Thus, licensees must make good faith, journalistic

judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively, less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under

elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to Station WALG, FCC 65–50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations, discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control what the public may hear concerning this other side, rather than permitting the person so vitally affected by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

[1] For similar reasons, we have exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side, as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the considerations set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the attacks are made by legally qualified candidate, their

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended; see also, § 1.108 of the Commission's rules and regulations.

6. *Accordingly, it is ordered,* That the rule revisions contained below are adopted, effective August 14, 1967. See section 4(c), Administrative Procedure Act. This proceeding is terminated.

(Secs. 4, 303, 315, 48 Stat. as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: August 2, 1967.

Released: August 7, 1967.

FEDERAL COMMUNICATIONS COMMISSION,[2]

[SEAL] BEN F. WAPLE, *Secretary.*

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598

authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the compaign.

[2] Commissioners Bartley, Loevinger, and Wadsworth absent; Commissioner Cox concurring in the result.

(b), and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (1) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See, section 315(a) of the Act, 47 U.S.S. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

324-010—68——6

APPENDIX E

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

IN THE MATTER OF AMENDMENT OF PART 73 OF THE RULES TO PROVIDE PROCEDURES IN THE EVENT OF A PERSONAL ATTACK OR WHERE A STATION EDITORALIZES AS TO POLITICAL CANDIDATES

Memorandum Opinion and Order

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (Radio Television News Directors Assn., et al. v. United States, Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. Such authority was granted by the Court, by order dated March 22, 1968, and this memorandum opinion and order deals with that revision. Since the revision is of a relatively narrow nature[1] and directed only to

[1] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance * * *", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

subsection (b) of §§ 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[2] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and are revising only one portion of it. See Red Lion Broadcasting Co. v. United States, 381 F. 2d 908 (C.A.D.C.), certiorari granted 88 Sup. Ct. 470.

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

3. We have consistently sought to promote the fullest possible robust debate on public issues. See letter to Storer Broadcasting Co., January 31, 1968, FCC 68–120. We have also stated our belief that the fairness doctrine promotes that goal. Ibid. CBS does not dispute the latter, but does claim, inter alia, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see memoran-

[2] See memorandum opinions and orders, 8 F.C.C. 2d 721 (July 5, 1967; 32 F.R. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 F.R. 11531).

dum opinion and order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to section 315 stressed the importance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, news interviews, and news documentaries, and on-the-spot coverage of bone fide news events—from the "equal opportunities" requirement of section 315, stating that the fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programing where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254–55. As the Senate Report (No. 560, 86th Cong., 1st sess.) stated in 1959, at page 11:

> It should be noted that the programs that are being exempted in this legislation have one

thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program.

In light of the above two considerations, we have decided to strike the balance in favor of exempting these news program categories, other than the news documentary. Such action avoids any possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities." The fairness doctrine remains specifically applicable to these programs. See section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st sess., p. 5; see paragraph 5, below.

4. We are expanding the exemptions in (iii) of subsection (b) to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[3] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of pub-

[3] We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertiment, will be followed in this field also. (See, e.g., H. Rept. No. 1069, 86th Cong., 1st sess., p. 4, as to the legislative history of the term "bona fide news interview.")

lic importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st sess., pp. 83–94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See paragraph 3, memorandum opinion and order, 9 F.C.C. 2d 539.[4] We note that in this area we have found instances of failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The section 315 exemption is limited to bona fide news documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even possible inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be

[4] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266–267.)

readily obtained and, indeed, we would expect this to be the usual practice. See note 4, supra.

5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (paragraph 9, Report on Editorializing by Broadcast Licensees, 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See Letter to Capital Broadcasting Co., Inc. (WRAL), July 29, 1964, FCC 64–774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issues; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have reexamined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying

the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendments to section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate any possibility of inhibitory effects.[5]

7. We have acted here to expand the exemption of program categories further along the lines of the ex-

[5] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt program categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

emption made on August 2, 1967 (FCC 67-923),[6] on the basis of the notice and the comments received in this docket (No. 16574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14): "* * * the public interest should benefit from it. If not, adequate opportunity to remedy it is available." That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in sections 4 (i) and (j), 303(r), and 315 of the Communications Act of 1934, as amended.

Accordingly, it is ordered, That the rule revisions as set forth below are adopted effective April 5, 1968. See section 4(c), Administrative Procedure Act. This proceeding is terminated.

(Secs. 4, 303, 315, 48 Stat., as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: March 27, 1968.

Released: March 29, 1968.

FEDERAL COMMUNICATIONS COMMISSION,[7]

[SEAL] BEN F. WAPLE, *Secretary.*

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[6] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, supra), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

[7] Commissioners Bartley's and Loevinger's dissenting statements and Commissioner Cox's concurring statement filed as part of the original document; Commissioner Johnson concurring in the result.

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598 (b), and 73.679(b) are revised to read identically as set forth below:

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 F.R. 10415. The categories listed in (iii) are the same as those specified in section 315(a) of the Act.

APPENDIX F

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), are as follows:

SEC. 4 [47 U.S.C. 154]:

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

SEC. 303 [47 U.S.C. 303]:

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 315 [47 U.S.C. 315]:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable

opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

2. The regulations under review appear in identical texts as 47 CFR §§ 73.123, 73.300, 73.598 and 73.679 (governing, in each case, a different class of broadcast station). The text is as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of

paragraph (a) shall be applicable to editorials of the licensee.)

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

U.S. GOVERNMENT PRINTING OFFICE: 1968

INDEX

	Page
Question Presented	2
Constitutional Provision, Statutes and Rules and Regulations Involved	2
Interest of Amicus Curiae	2
Discussion	3
I. This Court Should Hold This Case So That It Can Be Considered Together With A Related Proceeding Now Pending in the Court of Appeals for the Seventh Circuit	3
II. The Issues Are Important and Warrant Review by This Court	8
A. The Commission's personal attack doctrine raises serious questions under the First Amendment and Section 326 of the Communications Act	9
B. Apart from Section 326, there is a substantial question whether the Commission's personal attack doctrine is authorized by the Communications Act	19
Conclusion	22

CITATIONS

Cases:	
Aaron v. *Cooper*, 357 U.S. 566 (1958)	6
Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	8
Bates v. *City of Little Rock*, 361 U.S. 516 (1960)	12
Bay State Beacon, Inc. v. *Federal Communications Commission*, 84 U.S. App. D.C. 216, 171 F.2d 826 (1948)	16
Beauharnais v. *Illinois*, 343 U.S. 250 (1952)	9
Billings Broadcast Co., 23 Pike & Fischer R.R. 951 (1962)	22

Page

Brandywine-Main-Line Radio, Inc. v. *Federal Communications Commission*, No. 622, 1967 Term (U.S. Sup. Ct.) 5
Carter Mountain Transmission Corp. v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied* 375 U.S. 951 (1963) ... 16
Carter Oil Co. v. *Welker*, 317 U.S. 592 (1942) 5
Columbia Broadcasting System, Inc., In the Matter of Petition of, 26 F.C.C. 715 (1959) 14, 22
City Co. of New York v. *Stern*, 312 U.S. 666 (1941) 5
Clayton W. Mapoles, 23 Pike & Fischer R.R. 951 (1962) 22
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 6, 10, 11, 17
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 18
Farmers Union v. *WDAY, Inc.*, 360 U.S. 525 (1959) .. 13, 19
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) 12
Gilbery v. *Goffi*, 21 App. Div. 2d 519, 251 N.Y. Supp. 2d 823 (1964), *aff'd. without opinion*, 15 N.Y. 2d 1023, 260 N.Y. Supp. 2d 29, 207 N.E. 2d 620 (1965) 12
Greene v. *McElroy*, 360 U.S. 474 (1959) 18
Henry v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F.2d 191, *cert. denied*, 371 U.S. 821 (1962) 16
Idaho Microwave, Inc. v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965) 16
Johnston Broadcasting Co. v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949) 16
Louisiana ex. rel. Gremillion v. *NAACP*, 366 U.S. 293 (1961) 12
Manual Enterprises, Inc. v. *Day*, 370 U.S. 478 (1962) .. 12
Michalek v. *United States Gypsum Co.*, 298 U.S. 639 (1936) 5
NAACP v. *Alabama*, 357 U.S. 449 (1958) 12
National Broadcasting Co., Inc. v. *United States*, 319 U.S. 190 (1943) 15, 16
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 9, 10, 11, 12, 17

Page

Pauling v. *News Syndicate Co.*, 335 F.2d 659 (2nd Cir. 1964), *cert. denied*, 379 U.S. 968 (1965) 9
Personal Attacks, Political Editorials, Memorandum Opinion and Order, 32 Fed. Reg. 10303 (July 5, 1967) 3, 6, 8, 12, 13, 21
Procedures in Event of Personal Attack or Where Station Editorializes as to Political Candidates, Memorandum Opinion and Order, 32 Fed. Reg. 11531 (August 2, 1967) 4, 13
Radio Television News Directors Ass'n v. *United States*, No. 16369, 7th Cir. 4
Rosenblatt v. *Baer*, 383 U.S. 75 (1966) 9
Shelton v. *Tucker*, 364 U.S. 479 (1960) 12
Simmons v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F.2d 670, *cert. denied*, 335 U.S. 846 (1948) 16
Smith v. *California*, 361 U.S. 147 (1959) 11
Superior Films, Inc. v. *Department of Educ.*, 346 U.S. 587 (1954) 15
Talley v. *California*, 362 U.S. 60 (1960) 12
Time, Inc. v. *Hill*, 385 U.S. 374 (1967) 9
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 18
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 15
United States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963) 6
Walker v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F.2d 189 (6th Cir. 1966) 9

UNITED STATES CONSTITUTION, STATUTES, AND RULES:

First Amendment 8, 9, 10, 11, 12, 14, 15, 16, 18, 19

47 U.S.C.
Sec. 307(d) 3
Sec. 312 3
Sec. 315 .....14, 18, 19, 20, 21, 22
Sec. 326 .....9, 19, 20
Sec. 501 3
Sec. 502 3
Sec. 503(b) 3

SUPREME COURT RULES: Page

Rule 20 6
Rule 42 1

Nevada Revised Statutes (1963), Sec. 200.570 12

MISCELLANEOUS:

Brief for Appellant United States of America in No. 21147, D.C. Cir., (*United States of America* v. *Federal Communications Commission*) 19
Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 COLUM. L. REV. 255 (1946) 5
CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947) 14, 17, 19
105 Cong. Rec. 14447 (1959) 14
67 Cong. Rec. 12504 (1926) 20
H.R. No. 5415, 89th Cong., 1st Sess. (1965) 20
H.R. No. 7072, 88th Cong., 1st Sess. (1963) 20
H.R. No. 7612, 88th Cong., 1st Sess. (1963) 20
H.R. No. 3595, 80th Cong., 1st Sess. (1947) 20
H.R. No. 3039, 75th Cong., 1st Sess. (1937) 20
Note, *The Right of Reply: An Alternative To An Action for Libel*, 34 VA. L. REV. 867 (1948) 14
Office of Network Study, Second Interim Report, Television Network Program Procurement,
Part I (1962) 17
Part II (1965) 17
Report and Statement of Policy Re: Commission *En Banc*, Programming Inquiry, 25 Fed. Reg. 7291 (1960) 17
Report on Editorializing, 13 F.C.C. 1246 (1949) ..9, 21
S. No. 1333, 80th Cong., 1st Sess. (1947) 20
S. No. 814, 78th Cong., 1st Sess. (1943) 20
S. No. 635, 76th Cong., 1st Sess. (1939) 20
UNITED STATES BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967 (88th ed.) .. 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC.
and
REVEREND JOHN M. NORRIS, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM AMICUS CURIAE ON BEHALF OF THE COLUMBIA BROADCASTING SYSTEM, INC.

Pursuant to Rule 42 of the Rules of this Court, consent to the filing of this memorandum *amicus curiae* has been granted by both petitioners and respondents.

QUESTION PRESENTED

Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station broadcasts statements reflecting upon the "integrity, character, honesty or like personal qualities" of any person in the "context" of a controversial issue of public importance, it must notify such person and grant him time to reply.

CONSTITUTIONAL PROVISION, STATUTES AND RULES AND REGULATIONS INVOLVED

The constitutional provision, statutes and rules and regulations involved are set forth as Appendix A hereto.

INTEREST OF AMICUS CURIAE

The decision of the Court of Appeals for the District of Columbia Circuit in this case sustains the legality of the Federal Communications Commission's so-called "personal attack" doctrine, as applied to a particular broadcast by a particular station. Under the personal attack doctrine, when a station licensee broadcasts a "personal attack" (a statement reflecting upon the "integrity, character, honesty or like personal qualities" of an individual or group) in the "context" of a controversial issue of public importance, the licensee is required to notify the individual or group attacked and to afford broadcast time for reply.

Pursuant to licenses from the Federal Communications Commission (hereinafter the "Commission"), Columbia Broadcasting System, Inc. (CBS) owns and operates television and/or radio stations in Boston,

Chicago, Los Angeles, New York, Philadelphia, St. Louis and San Francisco. These stations regularly carry programs in which CBS personnel or third persons discuss significant issues of a controversial nature or describe events in the "context" of a controversial issue of public importance. Such programs frequently contain statements which the Commission now considers to be subject to its personal attack requirement. CBS also owns and operates a television network and a radio network which furnish such programs regularly to several hundred broadcast stations.

DISCUSSION

I. This Court Should Hold This Case So That It Can Be Considered Together With a Related Proceeding Now Pending in the Court of Appeals for the Seventh Circuit.

This case involves an application of the Commission's personal attack doctrine to a particular broadcast made in 1964, at a time when this doctrine constituted informal and loosely defined Commission policy, enforceable if at all only in connection with the Commission's power to consider public interest factors when it renews broadcast licenses. After the decision below, the Commission issued a Memorandum Opinion and Order, 32 Fed. Reg. 10303, amending Part 73 of its rules and regulations and adding new rules purporting to define the obligations of any broadcast licensee when a personal attack is broadcast over its facilities. (The new rules appear in Appen. A, *infra,* pp. 2a-4a.) Under Sections 307 (d), 312, 501, 502 and 503(b), of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), 312, 501, 502 and 503(b), violation of the Commission's new rules can subject a broadcast licensee to a Commission cease and desist order, revocation of his license, money forfei-

tures and criminal penalties, as well as denial of license renewal.

The Commission's new personal attack rules were adopted on July 5, 1967, after a rule making proceeding in which CBS and many other broadcast licensees filed comments opposing the new rules. On July 27, 1967, CBS filed a petition to review the new rules (Appendix B hereto) in the Court of Appeals for the Second Circuit. Earlier the same day other broadcasters and an association of radio and television news directors filed a similar petition in the Seventh Circuit. No. 16369, 7th Cir., *Radio Television News Directors Ass'n* v. *United States.* The Second Circuit thereafter transferred the CBS petition and a similar petition filed by NBC to the Seventh Circuit.[1] Certain of the issues raised in the petitions for review are closely related to the issues presented by the petition for certiorari herein.

On October 2, 1967, the Seventh Circuit ordered the briefs for petitioners therein to be filed by November 21, 1967, the brief for the respondents (the United States and the Commission) to be filed by December 21, 1967, and any reply briefs for the petitioners to be filed by January 12, 1968. Argument is anticipated in February 1968. Whether the Commission's new rules are

[1] On August 2, 1967, the Commission, recognizing the deterrent effect of the new personal attack rules upon the broadcast of news programs, adopted a further Memorandum Opinion and Order limiting the new rules to make them generally inapplicable "to bona fide newscasts or on-the-spot coverage of a bona fide news event," but continuing their applicability to interviews, editorial material and documentaries. 32 Fed. Reg. 11531. (The amendments to the new rules appear in Appen. A, infra, p. 4a.) Supplemental petitions to review the Memorandum Opinion and Order of August 2, 1967, were filed by CBS and the others who had sought review of the Commission's original Memorandum Opinion and Order. (The CBS supplemental petition appears as Appendix C hereto.)

sustained or invalidated by the Seventh Circuit, it seems likely that one or more of the parties in that case will petition for review in this Court and that the petition will reach this Court before the end of the present Term.[2]

For reasons stated below CBS agrees that the issues presented by the petition for certiorari are of importance and warrant review. CBS respectfully suggests, however, that this Court hold the present petition so that it can consider this case after the closely related proceeding in the Seventh Circuit has further matured.[3] The Seventh Circuit's decision and opinion on these important issues in the context of general rules governing future licensee behavior should be of great value to this Court. This is particularly so because the decision of the District of Columbia Circuit here involved

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[2] A petition for certiorari is also presently pending in No. 622, this Term, *Brandywine-Main Line Radio, Inc.* v. *Federal Communications Commission*. The threshold issue before this Court in that case seems to be whether a court of appeals has jurisdiction to stay an administrative hearing where one of the issues in the hearing is alleged to be beyond the Commission's power to consider, even though there are other admittedly legitimate issues which can be considered in the hearing. Petitioners there allege that such a stay of the hearing is justified because the Commission has unlawfully included as one issue in the hearing the licensee's compliance with the personal attack doctrine. CBS takes no position on the immediate issue before the Court in *Brandywine*—the power of the court of appeals to stay an administrative hearing. Although the ultimate issues in the *Brandywine* case are related to the issues presented herein and in the pending Seventh Circuit case, those issues seem not to have decided in *Brandywine* by the court of appeals.

[3] See generally *Carter Oil Co.* v. *Welker*, 317 U.S. 592 (1942); *City Co. of New York* v. *Stern*, 312 U.S. 666 (1941); *Michalek* v. *United States Gypsum Co.*, 298 U.S. 639 (1936); Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 COLUM. L. REV. 255, 267-68 (1946).

an *ad hoc* application of the personal attack doctrine against one licensee; and the decision was rendered by only two judges and without an opinion of the court, Judge Fahy having concurred in the result but not in "all the details" of Judge Tamm's opinion. To permit prior consideration of closely related issues by a full panel of another court of appeals would be in keeping with this Court's policy of soliciting "the valuable assistance of the Courts of Appeals."[4] Adherence to this policy also seems important here because the decision of the court below was issued on June 13, 1967, only one day after this Court announced its decision in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. Although the *Butts* case is directly relevant to the issues presented herein (see pp. 9-12, *infra*), it is not mentioned in Judge Tamm's opinion nor in Judge Fahy's brief concurrence. This Court may therefore prefer to await an opinion by the Seventh Circuit in which the bearing of the *Butts* case on the Commission's personal attack rules will doubtless be carefully explored.

In addition, while it seems beyond question that the Commission would have reached the same result in this case if it had arisen under the new rules, issues as to lawfulness of an administrative policy can best be viewed in the context of the rules governing adherence to the policy in all future situations. The Commission has stated that the new rules now before the Seventh Circuit "clarify and make more precise the obligations of broadcast licensees where they have aired personal

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[4] *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n. 1 (1963). See also *Aaron* v. *Cooper*, 357 U.S. 566 (1958); Rule 20 of the Rules of this Court (certiorari before judgment in the court of appeals).

attacks . . . ." (July 5, 1967, Memorandum Opinion and Order ¶ 3).

Finally, if this Court should grant certiorari herein at this time and decide the present case, it might not be relieved of the need to speak further when and if petitions to review the pending Seventh Circuit case come to this Court. Although the Commission in this case purported to apply a general Commission policy concerning personal attacks, the actual order in the case is simply a single ruling by the Commission in a specific factual context, involving a single broadcast by a single station. The informal personal attack policy thus applied in this ruling has not been enforced by the Commission in any case except in periodic license renewal proceedings through consideration (or threats of consideration) of violations of the policy along with consideration of a licensee's general stewardship of his station. The Seventh Circuit case, on the other hand, involves newly adopted categorical directives which bring to bear the full force of formal agency rules. The rules apply to any broadcasts by any station containing any material falling within the sweeping but imprecise orbit of the rules. The rules are enforceable by criminal and civil sanctions for violation. Thus, the uncertain sanction of future denial of license renewal under the old policy has been buttressed under the new rules by the availability of immediate cease and desist proceedings, monetary forfeiture proceedings, license revocation proceedings, criminal penalties, or some combination of these sanctions.

In view of the differences in timing and severity of the sanctions involved, the chilling effect upon free expression by broadcasters of the Commission's new

rules will be even greater than the inhibitory effect of the Commission's earlier policy involved in this case. Indeed, the rules were adopted to facilitate more vigorous enforcement of the personal attack policy and encourage greater voluntary compliance.[5] Thus, from the point of view of the First Amendment, the Seventh Circuit proceeding may present significant new questions not resolvable in the present case.

II. The Issues Are Important and Warrant Review by This Court.

This case presents critical issues as to the constitutional and statutory legality of a substantial restriction on rights of free expression. Although this Court has recognized that the First Amendment applies to radio and television, for more than twenty years it has not rendered a major opinion considering the rights of broadcast licensees under the First Amendment. This Court has never rendered an opinion squarely considering the extent, if any, of the Commission's constitutional or statutory authority to control program content. As demonstrated below, the decision of the Court of Appeals for the District of Columbia Circuit in this case was erroneous, and conflicts in principle

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[5] The Commission in its July 5, 1967, Memorandum Opinion and Order (¶ 7) noted that "Despite such notification [in policy statements by the Commission] and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

The ripeness of the *Red Lion* ruling for review has been expressly sustained by the court of appeals below sitting *en banc*. The correctness of this decision seems settled by *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and by the Commission's rule-making cases relied on therein.

with decisions of this Court vindicating First Amendment rights for other media of expression.

A. The Commission's personal attack doctrine raises serious questions under the First Amendment and Section 326 of the Communications Act.

Until this Court's 1964 decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, it was generally assumed that the First Amendment did not prevent a state or the federal government from awarding damages for the publication of libelous or slanderous statements. See, *e.g.*, *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952). However, in *New York Times*, a case involving libel of a public official, this Court determined that a state could not award compensatory or punitive damages for libelous or slanderous statements respecting such an official unless the statements were false and were made with actual malice—that is, with knowledge that they were false or with reckless disregard of the truth.

After *New York Times*, separate opinions by members of this Court and various lower court decisions suggested that the *New York Times* rule might apply not merely to statements concerning public officials but also to statements relating to matters of public importance.[6] Late last Term the scope of that rule was

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[6] See *Time, Inc.* v. *Hill*, 385 U.S. 374, 388, 415 (1967) (majority and dissenting opinions); *Rosenblatt* v. *Baer*, 383 U.S. 75, 91 (1966); *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F. 2d 189 (6th Cir. 1966); *Gilberg* v. *Goffi*, 21 App. Div. 2d 519, 525-28, 251 N.Y. Supp. 2d 823, 830-32 (1964), *aff'd without opinion*, 15 N.Y. 2d 1023, 260 N.Y. Supp. 2d 29, 207 N.E. 2d 620 (1965); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964) (dictum), *cert. denied*, 379 U.S. 968 (1965). See also *New York Times Co.* v. *Sullivan*, 376 U.S., at 295-96 (Black and Douglas, JJ., concurring).

clarified in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). While there was no opinion speaking for a majority of the Court, there was unanimous agreement among the Justices that the *New York Times* rule, or a variant thereof, applies to "public figures"—those "involved in issues in which the public has a justifiable and important interest." *Id.*, at 134. See also *id.*, at 154-55. As a result it is now clear that it is unconstitutional for a state or the federal government to impose punishment or award damages for false and defamatory but non-malicious statements in publications concerning persons involved in issues of public importance.[7]

The Commission's personal attack doctrine, like the tort rules before the Court in the *New York Times* and *Butts* cases, imposes a governmental sanction against statements reflecting adversely upon the character of individuals or groups made in the context of a discussion of an issue of public importance. The Commission's doctrine merely creates a somewhat different remedy. Instead of imposing civil damage liability, it compels a broadcaster to carry the reply of the per-

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[7] The opinion of Mr. Justice Harlan, in which Justices Clark, Stewart and Fortas joined, would have allowed recovery under such circumstances "for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S., at 155. The relevant portion of the opinion of Mr. Chief Justice Warren, in which Justices Brennan and White joined, adhered to the *New York Times* standard for "public figures." 388 U.S., at 162-63. Justices Black and Douglas reiterated their position that even false statements made with actual malice are protected by the First Amendment. 388 U.S., at 170-71. Thus, a majority of the Court holds to a principle at least as protective of publication as that stated in the text.

son "attacked". In certain respects, this right of reply remedy goes much further than the tort rules before the Court in *New York Times* and *Butts*. Its sanction is to be imposed even if the statement involved is entirely true, or, if the statement is false, even if it is made without malice. This wider sweep plainly invests the Commission's doctrine with a wider inhibitory or chilling effect, and if damages were involved, it would be clearly invalid. One would hardly suppose that the courts would sustain as constitutional a statute authorizing damages for defamatory statements even when truthful and made in good faith.

Although the benefits conferred and the burdens imposed by the right of reply requirement are somewhat different from those imposed by ordinary libel and slander remedies, this difference is not constitutionally significant. Indeed, in some circumstances both the benefits and the burdens of a right of reply may be greater than would be true of damages. The right of reply sanction is in essence the equitable remedy of mandatory injunction, which is generally regarded as a drastic and unusual remedy, available only when mere damages are inadequate.

The monetary and other burdens imposed by the right of reply, no less than the traditional damage remedy for libel, lead to the self-censorship respecting matters of importance to the public that the First Amendment denies the government the power to impose. The burdens certainly are at least as onerous as such indirect restrictions on First Amendment rights as a requirement that a bookseller examine the contents of his shop,[8] a requirement that a magazine pub-

[8] *Smith* v. *California*, 361 U.S. 147 (1959).

lisher investigate his advertisers,[9] a requirement that names and addresses of sponsors be printed on handbills,[10] a requirement that organizations supply membership lists,[11] and a requirement that individuals disclose organizational memberships[12]—all of which have been held unconstitutional on the ground that they discouraged or chilled constitutionally protected rights of speech, press or association.

From the above discussion it is plain under *New York Times* and related cases that a right of reply in printed media raises very serious questions under the First Amendment.[13] The Commission's argument for the constitutionality of its right of reply sanction[14] must rest on the contention that, aside from the question whether or not the right of reply could constitutionally be required in printed media, broadcasting stands upon a different footing. But the right of reply sanction plainly interferes more with editorial preparation and imposes greater monetary burdens in broad-

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[9] *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 492-93 (1962) (opinion of Harlan, J.).

[10] *Talley* v. *California*, 362 U.S. 60 (1960).

[11] *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

[12] *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

[13] In the United States there is only one general right of reply statute (Nev. Rev. Stat. § 200.570 (1963)), and it is not applicable to broadcasters. So far as we know no United States case has considered the constitutionality of a reply statute under the First Amendment.

[14] See July 5, 1967, Memorandum Opinion and Order ¶ 5.

casting than in newspaper publishing. A newspaper has few practical limitations on the number of pages and columns of print it can publish, while the number of programs that can be broadcast is sharply limited by the element of time. Thus threatened with severe disruption of normal programming through forced provision of "reply" time, many broadcasters will decide to delete any material even arguably subject to the vague contours of the personal attack doctrine.[15]

The Commission initially suggested that its new rules "do not prescribe in any way the presentation by a licensee of personal attacks."[16] But within a month the Commission was forced to concede that presentation of personal attack material in "bona fide newscasts" and "on-the-spot coverage of bona fide news events" would be deterred unless the newly issued rules were amended to make them inapplicable in that area.[17] The Commission's reasoning as to the deterrent effect of these aspects of the rules necessarily extends not merely to "bona fide newscasts" and "on-the-spot coverage of bona fide news events," but also to "news documentaries" and "news interviews", and other related programs to which the amended rules continue specifically to apply.

The inhibitory effect of a right of reply sanction in broadcasting has been authoritatively recognized in

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[15] Compare *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959) "quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks evenly faintly objectionable would be excluded out of an excess of caution." (*id.*, at 530).

[16] July 5, 1967, Memorandum Opinion and Order ¶ 5.

[17] August 2, 1967, Memorandum Opinion and Order ¶ 2.

other quarters. This very concern led Congress to amend Section 315 of the Communications Act, as amended, 47 U.S.C. § 315, to make the provisions for equal time for political candidates inapplicable not only to newscasts and on-the-spot coverage but to news-related programs of the type still covered by the Commission's personal attack rules.[18] France and Germany have had extensive experience with right of reply statutes.[19] Although unfettered by First Amendment restraints, the laws of both countries exempt radio and television from right of reply requirements.[20]

Yet the Commission argues that its right of reply sanction does not infringe the First Amendment because the broadcast medium is different from the medium of print. The argument runs that the num-

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[18] Senator Hartke, among others, commented that in his home state broadcasters had begun to black out political coverage in mere anticipation that the *Lar Daly* decision (*infra*, pp. 21-22) would be handed down. 105 Cong. Rec. 14447 (1959).

[19] See generally Note, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), pp. 187-190.

[20] See CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), pp. 187-88:

> "The radio is obviously unsuited to the simple machinery of reply provided by the French and German statutes [obligating the press to print replies to personal attacks]. It might be entirely natural for a commentator to mention two or three prominent persons, e.g., Mr. Ickes, Mr. Pauley, and Mr. Truman, in a single broadcast. If each of those three men should possess the legal right to reply, they would take over practically all the time of this commentator for his next broadcast. The whole character of news comments might easily be changed by such a legal requirement. Consequently, French and German courts have held their statutes inapplicable to the radio."

ber of available broadcast channels is limited while the number of newspapers is not, that the government must necessarily license one medium but not the other, and that the best way to assure full discussion of all sides of an issue is to require that each broadcaster allow time for reply to personal attacks broadcast in the "context" of an issue of public importance. The factual assumption is dubious. In fact, there are more radio and television stations broadcasting daily than there are daily newspapers in the United States.[21] However, even assuming the correctness of the Commission's factual assumption, its conclusions of lack of First Amendment protection does not follow.

As the opinion of Judge Tamm below conceded, and as this Court has stated, radio and television are protected by the First Amendment. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (dictum); *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring). See also *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 226-27 (1943). The First Amendment does not rest on the theory that freedom of speech is best served if each source will present a balanced view of any controversial issue, but on the theory that a multiplicity of sources, whether individually balanced or unbalanced, will enable the public to hear all sides. While it may be that some governmental restrictions can be constitutionally applied to a broadcaster but not to a newspaper pub-

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[21] There are approximately three times as many commercial broadcasters as there are daily newspapers. See U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967 (88th ed.), pp. 515, 519.

lisher, the right of reply sanction is not in that class.[22] Under its personal attack doctrine the Commission asserts the power to dictate the content of particular programs. It compels a station to broadcast a program consisting of a statement by a particular person on a particular subject whether or not the licensee chooses to carry the program. The circumstances in which a reply is to be carried and the licensee's discretion, if any, to determine the content of the reply are to be resolved by the Commission. If the decisions that broadcasting is protected by the First Amendment are to have any meaning at all, they must mean that the Commission has no power to compel a station to carry a particular

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[22] The cases relied on by the opinion below, while sustaining Commission action affecting programming, do not support the Commission's power to dictate the content of specific programs. Three of the cases sustain Commission power at the time of license application or amendment to consider overall station programming or to consider efforts of the applicant to ascertain community program needs and desires. *Henry* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. denied*, 371 U.S. 821 (1962); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949); *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 216, 171 F. 2d 826 (1948). Two of the cases sustain Commission power to prohibit licensees from entering into contracts or commitments restricting the further exercise of programming judgment. *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943); *Simmons* v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F. 2d 670, *cert. denied*, 335 U.S. 846 (1948). Two other cases sustain Commission power to prevent a common carrier radio licensee from extending a signal of one broadcast station to a distant market where it would duplicate the signal of a local station in that same market. *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359, *cert. denied*, 375 U.S. 951 (1963).

program.[23] The Commission itself has generally recognized this limitation,[24] though the personal attack doctrine represents a signal departure from this policy of restraint.

In short, as Professor Chafee has pointed out:

> ". . . the First Amendment prevents the FCC from engaging in two kinds of activity. The first of these embraces what Congress had in mind when it forbade the Commission to exercise 'censorship' over radio communications. This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—*the deletion of specific items and dictation as to what should go into particular programs. Such supervision of details is in no way part of the Commission's job of allocating wave lengths.*" [Emphasis supplied and footnotes omitted.][25]

From a constitutional standpoint, the Commission's personal attack doctrine is significantly different from the Commission's general fairness requirement, which —while some see in it other constitutional infirmities— does not compel licensees to broadcast particular pro-

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[23] If the Commission's personal attack doctrine were held invalid, it would not mean that a person maliciously and falsely defamed would be without remedy. As in the newspaper situation, normal libel remedies will apply in such cases under the *New York Times* and *Butts* rules.

[24] Office of Network Study, Second Interim Report, Television Network Program Procurement, Part I (1962), p. 34, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963); *id.*, Part II (1965), p. 777; Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 25 Fed. Reg. 7291 (1960).

[25] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), p. 641.

grams or to offer time to particular spokesmen, but imposes only a general requirement of licensee fairness and objectivity reviewable together with other elements of stewardship of the station at the time of license renewal. Thus, any constitutional questions presented by the Commission's general fairness requirement need not be reached in considering the narrow constitutional issues raised by the personal attack doctrine.

Section 315 of the Communications Act, requiring equal time for political candidates, deals with the unique problems presented by the use of broadcast facilities for political campaigns. Arguably, Congress may have power to place some restrictions upon the direct involvement of federally licensed broadcast stations in political campaigns, including a requirement that opposing candidates be treated in an even-handed manner. Cf. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). Moreover, the candidates' rights to reply to one another are carefully limited by Section 315, and do not extend either to statements by non-candidates or to statements by candidates on news-related programs—two areas in which the personal attack doctrine applies.

For the foregoing reasons it is believed that the Commission's rules raise the gravest of questions under the First Amendment. Whether or not Congress would have constitutional power to enact the personal attack doctrine, the serious nature of the constitutional questions involved suggests that the general language of the Communications Act should not be construed to grant such an implied and dubious power to the Commission. *Eastern Railroad Presidents Conference* v.

Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

Although we believe and have urged that Congress itself could not validly enact the personal attack doctrine, the invalidity of the Commission's rules may be established on the basis of the Communications Act alone. Included in Section 326 of the Act, 47 U.S.C. § 326 (Appen. A *infra*, p. 2a), is an explicit denial to the Commission of power to censor broadcasts; in addition there is a prohibition against any regulation "which shall interfere with the right of free speech by means of radio communication." This bar against program supervision by the Commission surely was intended at a minimum to incorporate the free speech provisions of the First Amendment.[26] In a recent case where the United States has appealed from a decision where the Commission has claimed for itself a watchdog role as to a licensee's future news programming objectivity, the brief for the United States points out:

> "... a continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act. The Commission has not been given 'supervisory control of programs, business or policy' (*FCC* v. *Sanders Bros.*, 309 U.S. at 475)."[27]

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[26] See *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 529-30 (1959); CHAFEE GOVERNMENT AND MASS COMMUNICATIONS (1947), p. 641.

[27] Brief for appellant United States of America in No. 21147, D.C. Cir., *United States of America* v. *Federal Communications Commission*, p. 168.

B. Apart from Section 326, there is a substantial question whether the Commission's personal attack doctrine is authorized by the Communications Act.

Section 315 of the Communications Act, relating to equal time for political candidates, is the only section of the Act which restricts, or authorizes the Commission to restrict, licensee discretion in public affairs programming. Historically, Congress has consistently rejected attempts further to limit the discretion of broadcasters in that programming area.[28] For example, in 1927, during debates on the Radio Act, the Senate took out a provision which would have required that equal time be afforded to proponents of different viewpoints in public affairs discussions. Senator Dill warned that unless the equal time provisions were stricken with regard to the discussion of public questions ". . . a radio station . . . would have to give all their time to that kind of discussion, or no public question could be discussed."[29]

The personal attack doctrine involves precisely the type of governmental interference with broadcaster

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[28] See H.R. 3039, 75th Cong., 1st Sess. (1937) (broadcasters to set aside regular and definite periods for uncensored discussion of public questions and to afford at least one exponent of each opposing viewpoint equivalent facilities); S. 635, 76th Cong., 1st Sess. (1939) (similar to H.R. 3039, 1937); S. 814, 78th Cong., 1st Sess. (1943) (equal time for reply required when public officers discuss public questions); S. 1333 and H.R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for the presentation of different views whenever one viewpoint has been presented); H.R. 7612, 88th Cong., 1st Sess. (1963) (opportunity for response required when an individual subjected to ridicule by a candidate utilizing equal time pursuant to Section 315); H.R. 7072, 88th Cong., 1st Sess. (1963) (equal time to be offered opponent when station editorializes favoring one candidate or opposing his opponent); H.R. 5415, 89th Cong., 1st Sess. (1965) (similar to H.R. 7612, 1963).

[29] 67 Cong. Rec. 12504 (1926).

freedom to select public affairs programs that Congress has refused to approve. The Commission suggests, however, that the personal attack principle is a part of its fairness doctrine, requiring licensees who present one side of a public issue to present other points of view. It also suggests that Congress approved the personal attack principle when it referred to the Commission's fairness doctrine in the 1959 amendments to Section 315 of the Communications Act.[30] The 1959 amendments to Section 315, creating an equal time obligation exclusively for political candidates, did include language recognizing that general fairness requirements would still apply to news-related programs being exempted from the explicit equal time obligations. But this language did not express or imply approval of any personal attack doctrine. There was no suggestion in the hearings, committee reports or debates that anything resembling the personal attack requirement was inherent in the Act or the Commission's fairness doctrine. Indeed, it was not until 1962 that the Commission first announced the personal attack requirement,[31] and it was not until the decision in the

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[30] July 5, 1967, Memorandum Opinion and Order ¶ 4.

[31] See *Clayton W. Mapoles*, 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer, R.R. 951 (1962). It is true that in the Commission's 1949 Report on Editorializing, 13 F.C.C. 1246, 1251-52, the Commission included language to the effect that personal involvement in a controversy might be a factor to be considered along with other factors in determining whether to honor specific requests for discussion time on matters of public interest. But this language plainly recognized that station licensees had discretion to determine the circumstances in which a reply to an attack would be appropriate. The later *Mapoles and Billings* rulings themselves suggest only that, in the particular circumstances of each, failure to offer time for reply was an abuse of licensee discretion.

present case and the subsequent new rules that the principle was fully articulated.

Furthermore, the personal attack requirement is directly contrary to the spirit of the Section 315 amendments as conceived by Congress in 1959. The 1959 amendments had their genesis with a Commission ruling in the *Lar Daly* case [32] that the appearance of a candidate on a station's news or news-related programs constituted a use of broadcasting facilities, thus subjecting the station to the provisions of Section 315 and compelling it to afford equal time to a minor candidate. The amendments relieved broadcasters from what Congress believed to be an unduly restrictive, categorical requirement imposed by the *Lar Daly* ruling. The equal time provisions of Section 315 were made inapplicable to news and news-related programs, subject only to general requirements of fairness as they were then understood. To interpret these liberalizing amendments as sanctioning new restrictions on exercises of journalistic judgment by broadcasters is untenable.

CONCLUSION

The issues presented by this case are of substantial public importance and warrant review by this Court. For the reasons stated above, however, we respectfully suggest that this Court hold the petition for certiorari until the decision of the related case now pending in the United States Court of Appeals for the Seventh Circuit, so that the present petition can be considered in the light of the decision in that case

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[32] *In the Matter of Petition of Columbia Broadcasting System, Inc.*, 26 F.C.C. 715 (1959).

and along with any petitions for certiorari which may be filed therein.

Respectfully submitted,

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October 9, 1967

APPENDIX

APPENDIX A

Constitutional Provision, Statutes, and Rules and Regulations Involved.

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Communications Act of 1934, 48 Stat. 1064, as amended:

Sec. 315:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the

foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. (47 U.S.C., 1964 ed., Sec. 315.)

Sec. 326:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. (47 U.S.C., 1964 ed., Sec. 326.)

Federal Communications Commission Rules and Regulations—Amendments to Part 73, Chapter 1, 47 C.F.R.:

Rules adopted by the Commission July 5, 1967, 32 Fed. Reg. 10305-06:

Sec. 73.123. Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later

than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, section 315(a) of the Act (47 U.S.C. 315(a)); public notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reason-

able opportunity to prepare a response and to present it in a timely fashion.

[Secs. 73.300, 73.598 and 73.679, containing identical language, were also added.]

Amendments adopted by the Commission August 2, 1967, 32 Fed. Reg. 11532:

Sec. 73.123. Personal attacks; political editorials.

(b) The provisions of paragraph (a) of this section shall be inapplicable (1) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

[Secs. 73.300(b), 73.598(b) and 73.679(b) were also amended to contain identical language.]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC. *Petitioner*

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION *Respondents*

Petition for Review of an Order of the Federal Communications Commission

---

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this petition for judicial review of a final order of the Federal Communications Commission (hereinafter the Commission) and avers as follows:

I.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Petitioner owns and operates, pursuant to license from the Federal Communications Commission, television station WCBS-TV and radio stations WCBS and WCBS-FM in New York City, as well as television and/or radio stations in Boston, Chicago, Los Angeles, Philadelphia, St. Louis and San Francisco. Radio and television stations owned and operated by Petitioner regularly carry news broadcasts and other programs involving discussion of issues of a controversial nature. Some of these stations

also carry editorials endorsing candidates for political office. Petitioner also owns and operates a television network and a radio network, not licensed by the Commission, which furnish programs—including news and public affairs programs—daily to several hundred broadcast stations. Petitioner seeks review of an order of the Commission entered in proceedings entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, and released July 10, 1967, attached hereto as Appendix A).

2. These proceedings were initiated on April 6, 1966, by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposal included provisions purporting to codify the "personal attack" and "political editorial" branches of the Commission's "fairness" doctrine. Comments were filed by Petitioner and others in opposition to the proposed rule, while other parties favored its adoption.

3. The proposed rule was attacked on various grounds; as an unconstitutional restraint on free speech, as beyond the Commission's statutory authority, and as contrary to the public interest and general regulatory policies of the Commission. In the Memorandum Opinion and Order under review the Commission rejected the objections of Petitioner and others, and adopted the Rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Loevinger concurred in a separate opinion, and Commissioner Bartley dissented. Commissioner Wadsworth was absent. As authority for the adoption of the Rule, the Commission invoked Sections 4(i), 4(j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

4. The order under review amends Part 73 of the Commission's Rules (47 C.F.R.) by adding four identical sections (§§ 73.123, 73.300, 73.598 and 73.679) applying respectively to standard broadcast stations, FM broadcast stations, noncommercial educational FM broadcast stations, and television broadcast stations. Subsection (a) of the Rule provides that when, "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must within a week notify such person or group of the broadcast, furnish a script, tape or accurate summary of the "attack," and offer such person or group "a reasonable opportunity to respond over the licensee's facilities." Subsection (b) exempts from the requirements of subsection (a) attacks on "foreign groups or foreign public figures" and attacks made by candidates and their spokesmen and associates on other candidates or their spokesmen or associates. Apart from the exemptions subsection (a) of the Rule applies to any statement, comment or remark constituting a "personal attack" broadcast over a station's facilities, whatever the source. The subsection applies to statements made in the course of a news program or actual live coverage of a news event, or in a discussion program or documentary. It applies whether the statement is truthful or untruthful, whether the broadcaster acted with "malice", and whether the program presented fairly or unfairly the controversial issue and the facts on which the "attack" is based. While the Commission has conceded that "there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle" and that "the Rules are not designed to answer such questions," the Commission has invited licensees to "consult" it for "interpretation of our rules and policies" (Appendix A, page 6).

5. Subsection (c) of the Rule requires that when "a licensee, in an editorial, (i) endorse or (ii) opposes a

legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial" a script or tape together with an offer of "a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities." Where the editorial is broadcast within 72 hours prior to the day of election, moreover, "the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion."

6. In the Order under review, the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness" doctrine. This Rule may be enforced through imposition of criminal penalties or forfeitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b), as well as through license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312.

II.

Statement of Venue and Jurisdiction

7. Petitioner is incorporated in the State of New York and has its principal place of business in New York City. Venue in this Court is thus appropriate under Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343. Since the order involved is a final order of the Federal Communications Commission, this Court has jurisdiction over the subject matter of this petition under Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section

10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704.

8. As appears from paragraph 2 of the Commission's Memorandum Opinion and Order (Appendix A, page 1), Petitioner was a party to the proceedings leading to the Order under review, and filed comments in opposition to the proposed rule. Petitioner is a "party aggrieved" by reason of the Commission's Order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person . . . adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702, as more fully set forth in paragraphs 9-11 hereof.

III.

Effects of the Rule

9. The right of reply established by the Rule would disserve rather than promote the public interest in accurate and balanced presentation of information and opinion with respect to controversial issues. For example there are situations in which the "personal attack" appears in the course of a discussion of a controversial issue of public importance, but in which the "personal attack" is merely peripheral to the public issue. Moreover, Petitioner and other licensees present many programs in which both sides of a controversial issue, including the position of persons or groups "personally attacked," are fully and fairly presented. In such cases a right of personal reply is not required to promote the public interest in an accurate report, and, if the reply is one-sided, will indeed tend to mislead the public. To attempt to correct the imbalance by a response to the reply would be likely to produce a repetition of the original "personal attack,"

thus creating an obligation to invite a further reply, and so on ad infinitum. A similar proliferation would occur if the reply contained a "personal attack" upon a second individual or group, since the Rule would then impose a duty to invite a rejoinder from still another quarter.

10. Subsection (a) of the Rule would inhibit free and vigorous expression and debate on controversial issues of public importance. The presentation of news, documentary and discussion broadcasts, in which there is a vital public interest, would often be rendered impracticable if an individual or group upon whom a "personal attack" was made had to be accorded a right of reply as required by the Commission's Rule. To the extent that "personal attacks" may be claimed to be defamatory, compliance with the notification requirements of the Rule may also jeopardize defenses to a subsequent defamation suit.

11. Subsection (c) of the Rule would condition the right of broadcast licensees to present an editorial endorsement or disapproval of candidates for public office by according a right of reply to unfavored candidates. This new requirement would inhibit editorial endorsements.

IV.

Grounds on Which Relief Is Sought

12. The grounds relied upon as the basis for relief are as follows:

(a) The Commission has exceeded its powers under the Communications Act in promulgating the Rule. Sections 4(i), 4(j) and 303(r) of the Act are merely authorizations to take action, by rule making and otherwise, to implement powers granted elsewhere in the statute. Section 315 is limited to a highly specific "equal opportunities" provision for candidates and a general reference to the "fairness" doctrine

which does not confer any powers on the Commission. Congress has refused to provide a general federal broadcast libel remedy or even to broaden the narrowly limited statutory right of political candidates to reply to one another; Congress did not intend to empower the Commission to create a new private remedy for "personal attacks."

(b) By imposing a specific requirement that in certain circumstances a particular program (i.e., the reply of a particular individual) must be carried, the Rule amounts to program censorship by the Commission in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. § 326, prohibiting the Commission from exercising the power of censorship.

(c) Subsection (a) of the Rule would induce licensees to delete material they desire to broadcast for the sole purpose of eliminating possible "personal attacks" and thus reduce the burdens of complying with the Rule. The Rule is therefore contrary to the principles of free debate and discussion and to the spirit of the Act. *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

(d) The Rule violates the provision of Section 326 of the Communications Act that "no regulation . . . shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . ." Moreover, it cannot be presumed that Congress in enacting the Communications Act intended to empower the Commission to issue rules raising substantial questions of interference with fundamental First Amendment rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

(e) Whatever the intent of Congress, the Rule would abridge free expression, discussion and debate

in violation of the First Amendment. *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254 (1964); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Mills* v. *Alabama*, 384 U.S. 264 (1966).

(f) Even if regulation of the subject matter by rule were held to be within the Commission's power, the adoption of the Rule would be an abuse of discretion. Without achieving any public interest goal of comparable importance, it would inhibit the dissemination of news, discussion of controversial public issues, and expression of editorial opinion, functions of communications media that are vital to the political health of a free society.

V.

Relief Prayed For

14. Wherefore, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, adopted by said Order; and

(b) Grant such other or further relief as it determines to be just and necessary.

July 27, 1967.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC. *Petitioner*

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION *Respondents*

Supplement to Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this supplement to its petition for judicial review of an order of the Federal Communications Commission (hereinafter the Commission), filed July 27, 1967, and avers as follows:

1. The Commission adopted on August 2, 1967, and released on August 7, 1967, a Memorandum Opinion and Order (No. FCC 67-923) amending the Rule adopted in the Order under review. A copy of the Memorandum Opinion and Order is attached hereto as Appendix A.

2. The amendment exempts from the requirements of Subsection (a) of the Rule (dealing with "personal attacks") "bona fide newscasts or on-the-spot coverage of a bona fide news event." The "personal attack" provision of Subsection (a) still applies, however, to news documentaries and news interview programs, as well as to "editorial or similar commentary" included in newscasts or on-the-spot coverage of news events. For example, statements made on a news interview program such as "Face The Nation," even though they are of sufficient

news magnitude to make the first page of Monday morning newspapers throughout the country, would appear to be covered by the Rule, although a newscast reporting that the identical statements had been made on "Face The Nation" would appear to be exempt.

3. The amended Rule fails to remedy many of the defects present in the original version. Indeed the Commission, in adopting the amendment, specifically recognized the inhibitory effect of the original Rule on news programs and for that reason exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." Nevertheless, the Commission has retained the Rule in full force and effect as to news documentaries and news interview programs. Nothing in the amendment makes the Rule any less inhibitory or objectionable with respect to such programs.

4. As amended, the Rule has become even more uncertain in its application. Not only must licensees decide whether a statement constitutes a "personal attack" or occurs "during the presentation of views on a controversial issue of public importance"; they must also make judgments as to whether, if the program involved is a "bona-fide newscast or on-the-spot coverage of a bona fide news event," so as to be generally exempt from the Rule, the attack nonetheless is of such a nature (e.g., "editorial or similar commentary") so as to bring it back within the scope of the Rule. There is no indication in the Commission Memorandum Opinion and Order, moreover, whether interviews and documentary-type material broadcast in the course of newscasts and on-the-spot coverage of news events are, like editorials and commentary broadcast in such programs, still subject to the Rule. Uncertainty on these points, and the impracticability of obtaining timely advisory pre-broadcast rulings with respect to such a perishable commodity as news, will inevitably lead to licensee decisions to refrain from broadcasting news-related material and programs

that are arguably subject to the Rule. And to the extent the Commission receives and acts upon post-broadcast requests for advisory interpretations and waivers of the Rule, it will become increasingly involved in making editorial judgments heretofore the responsibility of the broadcaster.

5. While the grounds for relief stated in the Petition for Review continue to apply to the Rule as amended, the effects of the amendment require amplification of the grounds for relief as follows:

(a) The uncertainty as to what portions of generally exempted programs are still subject to the amended "personal attack" provision renders the Rule unconstitutionally vague.

(b) Continual supervision by the Commission of editorial judgments of broadcasters, through orders directing that licensees permit replies to "personal attacks," violates Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, and abridges freedom of the press in violation of the First Amendment.

(c) Because there is no rational basis, in terms of the public interest, for the Commission's distinction between program material covered and program material exempted under the amended Rule, the adoption of the Rule is arbitrary, unreasonable, and an abuse of discretion.

6. WHEREFORE, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted

July 5, 1967 in Docket No. 16574, as amended by the Order of the Commission adopted August 2, 1967 in said Docket, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, as amended, adopted by said Orders; and

(b) Grant such other or further relief as it determines to be just and necessary.

September 1, 1967.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
F I L E D
OCT 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 2

RED LION BROADCASTING CO., INC.,

and

REVEREND JOHN M. NORRIS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF NATIONAL BROADCASTING COMPANY, INC. AS AMICUS CURIAE

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October 9, 1967

INDEX

	PAGE
The Interest of National Broadcasting Company, Inc. in These Proceedings	1
Argument	4
History and Development of the FCC Rule to be Reviewed in the Seventh Circuit	4
This Court Has Never Approved FCC Regulation of Broadcast Content	7
The Impact of the Rule	8
The Role of the Press	10
Is Broadcasting Different?	15
Statutory Authorization	20
Consideration of this Case Should be Deferred	22
Conclusion	24

CITATIONS

PAGE

COURT CASES

Bates v. *Little Rock*, 361 U. S. 516 (1960) 15

Commonwealth v. *Boston Transcript Co.*, 249 Mass. 477, 144 N. E. 400 (1934) 13

Curtis Publishing Co. v. *Butts*, 388 U. S. 130 (1967) 12

FCC v. *American Broadcasting Co.*, 347 U. S. 284 (1954) 4, 10

FCC v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940) 7

Greene v. *McElroy*, 360 U. S. 474 (1959) 21

Grosjean v. *American Press Co.*, 297 U. S. 233 (1936) 12, 15

Hannegan v. *Esquire*, 327 U. S. 146 (1946) 21

Kent v. *Dulles*, 357 U. S. 116 (1958) 21

Lamont v. *Postmaster General*, 381 U. S. 301 (1965) 15

Lord v. *Winchester Star, Inc.*, 346 Mass. 764, 190 N. E. 2d 875 (1963), *cert. denied*, 376 U. S. 221 (1964) 13

Lovell v. *Griffin*, 303 U. S. 444 (1938) 10

McIntire v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (3rd Cir. 1945), *cert. denied*, 327 U. S. 779 13

Massachusetts Universalist Convention v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950) 13

Mills v. *Alabama*, 384 U. S. 216 (1966) 15

NBC v. *United States*, 319 U. S. 190 (1943) 7

New York Times v. *Sullivan*, 376 U. S. 276 (1964) 14

PAGE

Red Lion Broadcasting Co. v. *FCC*, 10 R. R. 2d 2001 (D. C. Cir. 1967) 6, 15, 20, 21, 22, 23

United States v. *Paramount Pictures*, 334 U. S. 131 (1948) 10

Whitney v. *California*, 274 U. S. 357 (1927) 12

STATUTES

Act of Aug. 24, 1960, P. L. No. 86-677, 74 Stat. 554 8

Communications Act of 1934, as Amended:

Section 303, 47 U. S. C. §303 21

Section 312(a)(4), 47 U. S. C. §312(a)(4) 6

Section 315(a), 47 U. S. C. §315(a) 5, 8, 20, 21

Section 326, 47 U. S. C. §326 20

Section 502, 47 U. S. C. §502 6

Section 503(b), 47 U. S. C. §503(b) 6

ADMINISTRATIVE DECISIONS, REPORTS AND NOTICES

Billings Broadcasting, 23 R. R. 951 (1962) 6

Brandywine-Main Line (WXUR), 4 R. R. 2d 697 (1965) 10

CBS, Inc. (*Lar Daly* case), 18 R. R. 701 (1959) 5

Clayton W. Mapoles, 23 R. R. 586 (1962) 6

Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940) 4

Mrs. Madalyn Murray, 5 R. R. 2d 263 (1965) 10

Times-Mirror Broadcasting, 24 R. R. 404 (1962) 6

F.C.C. Public Notice 6223, *Address by Chairman Hyde*, September 21, 1967 22

PAGE

F.C.C. Amendment of Rules *re* Personal Attacks and Political Editorials, 8 F.C.C. 2d 721, 10 R. R. 2d 1901 (1967) 2

F.C.C. Notice of Proposed Rule Making, April 6, 1966, 31 Fed. Reg. 5710 (April 13, 1966) 2

F.C.C. Public Notice, July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415, 2 R. R. 2d 1901 (1964) 6

F.C.C. Public Notice, July 26, 1963, 25 R. R. 1899 6

F.C.C. Report, *In the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R. R. 1901 (1949) 4

OTHER

BROADCAST YEARBOOK, 1966 18

EDITOR AND PUBLISHER YEARBOOK, 1966 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC.

and

REVEREND JOHN M. NORRIS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC. AS AMICUS CURIAE

Consent to the filing of this brief *amicus curiae* has been granted by both petitioners and respondents.

The interest of National Broadcasting Company, Inc. in these proceedings.

The petition for certiorari in the above-captioned matter challenges the legality of action taken by the Federal Communications Commission (hereinafter "FCC") in requir-

ing petitioners to make available to a person allegedly subjected to a personal attack on a radio broadcast free time in which to respond to that attack.

While this case was being briefed for the United States Court of Appeals for the District of Columbia, the FCC issued a Notice of Proposed Rule Making, FCC No. 66-291, Docket No. 16574, dated April 6, 1966, 31 Fed. Reg. 5710 (April 13, 1966), which contained a proposed codification of its policies with respect to "personal attacks", such as the one involved in this case, and with respect to editorializing as to political candidates.

The FCC received comments with respect to the proposed rule from approximately 45 groups and individuals, including the National Broadcasting Company, Inc. (hereinafter "NBC"), most of whom opposed the rule. The FCC, however, on July 5, 1967, adopted the rule in essentially the form proposed. 8 F.C.C. 2d 721, 10 R.R. 2d 1901 (1967).

In the case of editorial endorsement or opposition of political candidates the rule requires a broadcasting station (AM, FM, or TV): (1) to give notice within 24 hours (or advance notice if the editorial is broadcast within 72 hours of election day) to the candidates opposed or not endorsed for the same office, (2) to provide such candidates with a script or tape of the editorial, and (3) to offer broadcast time over the station's facilities for a response by a spokesman for such candidates. In the case of a "personal attack" on a program discussing controversial issues of public importance, similar notice and opportunity to respond must be afforded the person or group attacked. On August 2, 1967, the rule was amended by the FCC to exclude from the personal attack section of the rule bona fide

newscasts and on-the-spot coverage of a bona fide news event.* 8 F.C.C. 2d 721, 10 R.R. 2d 1911 (1967).

NBC petitioned for review of this rule in the Court of Appeals for the Second Circuit on September 1, 1967. Similar proceedings had been begun in the Second Circuit by Columbia Broadcasting System, Inc. and in the Seventh Circuit by The Radio Television News Directors Association and eight broadcasting companies. Motions by the FCC to transfer the petitions pending in the Second Circuit to the Seventh Circuit were not opposed by the petitioners and the motions were granted on September 25, 1967. A briefing schedule has been agreed upon by all the parties and approved by the Court which will expedite an early decision in the Seventh Circuit. That schedule contemplates that all briefs will be filed by January 12, 1968.

NBC, as the owner of radio and television broadcasting stations and the operator of radio and television broadcasting networks, has a vital interest in the policies of the FCC in this area. NBC submits this brief *amicus curiae* to urge that this Court defer its decision with respect to whether or not certiorari should be granted in this case until the important questions raised by this case and by the proceedings pending in the Seventh Circuit have been ruled upon by the Seventh Circuit, so that the decisions can be considered jointly by this Court. If the Court believes that it should not delay its action on the petition for certiorari, NBC respectfully requests that certiorari be granted and that briefing and argument on the merits be deferred until the proceeding now pending in the Seventh Circuit can be brought before this Court.

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* A copy of the rule, as amended, is printed as Appendix A hereto.

Argument

History and Development of the FCC Rule to be Reviewed in the Seventh Circuit

In 1941, in *Mayflower Broadcasting Corporation*, 8 F.C.C. 333 (1940), the FCC took the position that it was improper for its licensees to use their facilities for editorializing. Although the Commission actually held that since the applicant had agreed to cease broadcasting editorials it would be appropriate to renew its license, the *Mayflower* decision was taken as a blanket prohibition of editorializing by licensees.

Nine years later, in 1949, after public hearings on the question of editorializing by licensees, the FCC reversed the policy enunciated in the *Mayflower* case and set forth its first detailed statement of the "fairness doctrine" in its Report in the *Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R.R. 1901 (1949).* In paragraph 10 of this Report the FCC for the first time took the position that a person's involvement in a controversial issue of public importance might be a factor which should be considered in determining whether he should be heard as a spokesman for one of the relevant points of view because "elementary considerations of fairness *may* dictate that time be allocated to a person or group which has been specifically attacked over the station. . . ." (Emphasis supplied) (13 F.C.C. at 1252).**

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* The case remains, however, as an example of the reach which the FCC believes it is entitled to give the "fairness doctrine".

** Paragraph 10 of this Report states:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques

In 1959 the FCC decided in *CBS, Inc.* (*Lar Daly case*), 18 R.R. 701 (1959), that the appearance of a candidate in the course of a newscast was a "use" of a broadcasting station within the meaning of Section 315(a) of the Communications Act requiring the station to give "equal opportunities" to the other candidates for the office. This prompted Congress to amend Section 315(a) by adding a sentence exempting from the "equal opportunities" requirement appearances of candidates on "bona fide newscasts," "bona fide news interviews," "bona fide news documentaries," and "on-the-spot coverage of bona fide news events." The amendment added a second sentence which reads:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U. S. C. §315(a) (1964))

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of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist*" (Emphasis supplied) (13 F. C. C. at 1251-52).

The Commission's specific policy with respect to the "personal attack" and "political editorializing" aspects of the "fairness doctrine" was not developed until decisions were rendered in *Clayton W. Mapoles,* 23 R. R. 586 (1962), *Billings Broadcasting Co.,* 23 R. R. 951 (1962), and *Times-Mirror Broadcasting,* 24 R. R. 404 (1962), and was not fully set forth until the FCC's Public Notice dated July 26, 1963, F. C. C. No. 63-734, 25 R. R. 1899 (1963), and the FCC's Public Notice of July 1, 1964 entitled *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415, 2 R. R. 2d 1901 (1964).

The adoption by the FCC of the rule now under attack in the Seventh Circuit added several new dimensions to its previous administration of the "fairness doctrine." First, it established a rigid requirement, applicable to every "personal attack" in connection with a "controversial issue of public importance" in whatever context,* that the person or group attacked be given notification and time to respond; second, it enunciated a rigid requirement that a similar opportunity be afforded whenever a licensee endorses or criticizes a candidate for public office;** and, finally, it elevated both of these requirements to the status of rules, which means that a deviation from them will not only be relevant in license renewal proceedings but may also be punished by fines (47 U. S. C. §502), forfeitures (47 U. S. C. §503(b)) and by license revocation (47 U. S. C. §312(a)(4)).

It is obvious that the action taken by the FCC in the *Red Lion* case 10 R. R. 2d 2001 (1967), and in the adoption of this new rule poses to this Court issues of the most

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* With the limited exceptions contained in paragraph (b) of the rule, as amended on August 2, 1967.

** Although these requirements were anticipated by the FCC's Public Notice dated July 26, 1963, *supra,* the rigidity and penal consequences of a rule were not involved.

fundamental and far-reaching importance. This is so because this Court has never, since commercial radio developed and the FCC began its regulation of broadcasting, spoken to the question whether, or to what extent, the FCC can regulate the content of what is broadcast by radio and television licensees consistently with the Constitution, its statutory mandate, and the proper performance of its regulatory function.

This Court Has Never Approved FCC Regulation of Broadcast Content

Although this Court has upheld the constitutionality of the Communications Act, *NBC* v. *United States,* 319 U. S. 190 (1943), it has never approved FCC regulation of program content. To the extent that it has referred to regulation of that sort, the Court has emphasized the dangers inherent in any venture by the FCC into that area.

Thus, in *NBC* v. *United States, supra,* the Court was careful to point out that Congress had not authorized the FCC to choose among applicants on the basis of "their political, economic or social views . . .". Similarly, in *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940), the Court commented that:

> "The Commission is given *no supervisory control of the programs,* of business management, or of policy." (Emphasis supplied.) (309 U. S. at 475).

The question whether the FCC's regulation of broadcasters under the "fairness doctrine" in general, and the "personal attack" and "political editorializing" rule in particular, goes beyond its authority has never been presented to this Court.

The Impact of the Rule

A consideration of some of the obvious or probable effects of the FCC's rule makes evident the fundamental nature of the issues raised by its adoption:

1. *The rule discourages radio and television broadcasters from dealing with controversial issues of public importance.** It is obvious that almost any treatment of a controversial issue involves, either directly or inferentially, an attack on individuals or groups who are involved in or have taken positions with respect to those controversies. If a personal attack occurs, the licensee must incur the administrative burden and expense of making and sending transcripts or summaries to those attacked; he must disrupt his program schedule by providing time periods for any necessary replies; he must suffer the financial penalty of donating time on his facilities if the person attacked chooses not to pay for it; and he must incur the risk that whatever action he takes, the FCC may conclude, either that there was a "personal attack" in material he thought inoffensive, or that his compliance with the rule has been inadequate. It is apparent that the safer course is to avoid broadcasts involving controversial public issues.

2. *The rule will require broadcasters themselves to impose rigorous censorship on those who use their facilities.* Since the broadcaster is accountable, not only for his own use of his facilities to state positions, but for all material broadcast, he must carefully control what is uttered by those who appear on his station in order to insure that their utterances will not expose him to the penalties of a "personal attack" broadcast.

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* That the equal opportunities provision of Section 315 has had a similar effect was acknowledged by the Senate Committee on Interstate and Foreign Commerce in its Report favoring a joint resolution to suspend that provision during the 1960 Presidential campaign (S. Rep. No. 1539, 86th Cong., 2d Sess. (1960)) and by Congress in enacting the suspension (Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554).

Spontaneous discussion of a public issue, for example, will in many instances involve inadmissable risks, and any copy dealing with a public issue will require careful screening. It should also be noted that the material to be screened out is not merely the untrue, the defamatory, or the scurrilous, but anything which is in any respect critical of the "honesty, character, integrity, or like personal qualities" of a person or group. The burdens imposed by the principle are imposed irrespective of the extent to which the criticism is merited and, indeed, irrespective of whether the public interest urgently requires that the criticism be voiced.

3. *The rule, to the extent to which it is successful in securing its objective, insures a bland impartiality in the presentation of views on public issues.* Criticism is muffled by being incorporated in a total context which gives equal voice to every view. Thus the official or private culprit is assured that, whatever he may do, his conduct will receive from that part of the press which is broadcasting a measure of adulation or explanation equal to any criticism. Indeed, since the rule, in effect, subsidizes points of view which are expressed responsively, it may favor some points of view as against others. An example might be where an incumbent official is guilty of some malfeasance. Normally the official is safe unless his activities are publicly exposed and criticized. But if that happens, at least on radio or TV, the Commission would require that his response be subsidized, even though the criticism was paid for. Thus, if equal resources could be mustered in support of the criticism and the defense, the defender would be enabled to command twice as much attention as the attacker.

4. *The rule will place in the hands of the FCC the power, by its interpretations of the rule, to affect in more subtle ways the content of what is broadcast by its licensees.* NBC does not suggest that the Commission has used, or intends to use, the rule in a disingenuous way to achieve unexpressed objectives. Nevertheless

the rule undoubtedly contains many words and expressions of unclear content and susceptible of various interpretations, *e.g.*, "like personal qualities", "controversial issue of public importance", "group", and the like. In the hands of a Commission which chose to exercise it to promote or suppress particular points of view, the power to interpret a rule of such uncertain meaning could be a weapon of considerable force.*

It is evident that the Commission's rule is designed to have, and will have, an enormous impact on what is broadcast by the Commission's licensees. Governmental action having such an impact raises issues which strike at the heart of the democratic process as it functions in this nation.

The Role of the Press

This Court has frequently stated that radio, motion pictures and television enjoy the constitutional protection afforded the "press" by the First Amendment. See, *e.g.*, *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938), ("The press in its historic connotation apprehends every sort of publication which affords a vehicle of information and opinion."); *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948); *FCC* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

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* Commissioner Loevinger's dissenting opinion in *Mrs. Madalyn Murray*, 5 R. R. 2d 263 (1965) indicates that this problem is by no means hypothetical. In that case the Commission was requested, pursuant to the fairness doctrine, to direct 15 Hawaii radio stations to afford broadcast time for the discussion of atheism. In contrasting the opinions in that case with the opinions in *Brandywine-Main Line Radio, Inc. (WXUR)*, 4 R. R. 2d 697 (1965), Commissioner Loevinger said:

> "The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." (5 R. R. 2d at 269)

The necessity of such a rule is evident when we note that, according to a recent survey, more people in this country in 1967 relied primarily on television as a source for news than relied on any other medium. If television and radio are taken together, the reliance on broadcasting was far greater than the reliance on all other media combined. Moreover, the study showed a trend toward increasing reliance on broadcasting.* Thus, if broadcasting were excluded from First Amendment protection, freedom of the press would be denied to what may now be, and is likely increasingly to become, the most important segment of the press.

Underlying the Framers' desire to insure a "free press" was the view that a completely unfettered press would serve as a check on, and critic of, the Government's activities.

After surveying the history underlying the adoption of the First Amendment guarantee of a free press, Mr. Justice

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* Roper Research Associates, "Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967" (April 5, 1967). The relevant question posed by the researchers and the tabulated answers for the last five years were as follows:

"First, I'd like to ask you where you usually get most of your news about what's going on in the world today—from the newspapers or radio or television or magazines or talking to people or where?"

Source of most news	1959 %	1961 %	1963 %	1964 %	1967 %
Television	51	52	55	58	64
Newspapers	57	57	53	56	55
Radio	34	34	29	26	28
Magazines	8	9	6	8	7
People	4	5	4	5	4
Don't know or no answer	1	3	3	3	2

(Multiple answers accepted; column totals therefore exceed 100%.)

Sutherland in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), commented on the function of the press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; . . . . *A free press stands as one of the great interpreters between the government and the people.* To allow it to be fettered is to fetter ourselves." (297 U. S. at 250) (Emphasis supplied.)

See also concurring opinion of Justices Holmes and Brandeis in *Whitney* v. *California*, 274 U. S. 357 (1927).

More recently in *Mills* v. *Alabama*, 384 U. S. 216 (1966), the Supreme Court, speaking through Mr. Justice Black, also commented on the function of the press while striking down, as violating the Fourteenth Amendment, a state statute making it a crime for the editor of a daily newspaper to write or publish an editorial on election day urging people to vote a certain way on issues submitted to them:

> ". . . the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. *Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.*" (384 U. S. at 218-19) (Emphasis supplied.)

In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 149-50 (1967), this Court made it clear that the important function

of the press in criticizing the activities of public persons extends beyond the category of "public officials."

The guarantee of a free press has never meant and does not mean today, that it is the province of government to secure for every individual, group, or point of view free and equal access to the press.* There are two views which might be taken of the role of the government with respect to the press in a free society. One view might be that the role of the government is to regulate the press in such fashion that it serves as a platform for all voices that wish to be heard. The difficulties with such a view, among others, are that it places the government in a position to control the information and views which are

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* Benjamin Franklin is reported to have said that his newspaper was not a stagecoach with seats for everyone. MOTT, AMERICAN JOURNALISM 55 (3d ed. 1962). A substantial body of case law has subsequently held that there is no right of access to the press. In *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* 151 F. 2d 597 (3d Cir. 1945), *cert. denied,* 327 U. S. 779; which involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station, the court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action and stated:

> "Assuming arguendo that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind." (151 F. 2d at 601).

Accord, Massachusetts Universalist Convention v. *Hildreth & Rogers Co.,* 183 F. 2d 497 (1st Cir. 1950); *Lord* v. *Winchester Star, Inc.,* 346 Mass. 764, 190 N. E. 2d 875 (1963), *cert. denied,* 376 U. S. 221 (1964); *Commonwealth* v. *Boston Transcript Company,* 249 Mass. 477, 144 N. E. 400 (1924).

disseminated to the public and that it deprives the press of its active role in criticizing public and private action, and otherwise acting as what Mr. Justice Sutherland called an "interpreter" between the government and the people.

The second view, and the one undoubtedly enshrined in the Constitution, is that the safer and better course is to deprive the government of any power to control and regulate the press, particularly in the area of reporting or comment which might affect political, social, and economic judgments. This Court has frequently recognized that the role contemplated for the press was an active one, that it was to be, not merely a conduit of information or views, but a critic and gadfly. It was viewed as one of the independent but interacting forces which would combine to ensure a government responsive to criticism and reflective of the will of the people. This role of the press was well defined by this Court in *New York Times* v. *Sullivan*, 376 U. S. 276 (1964), by reference to Madison's report on the Virginia Resolutions:

> "Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood: on this foundation it yet stands . . . .' 4 Elliot's Debates, supra, p. 570." (376 U.S. at 275)

This Court has condemned over the years, not merely governmental action overtly suppressing the expression by

the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role. "Freedoms such as [speech, free press] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960).

In *Grosjean* v *American Press Co.*, 297 U.S. 233 (1936), this Court struck down a tax based on newspaper circulation as an abridgement of the freedom of the press. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), it was held that even the necessity of returning a reply card in order to secure delivery of Communist mail imposed a sufficient limitation on the "unfettered exercise" of first amendment rights to be unconstitutional. As has been noted above, this Court in *Mills* v. *Alabama*, 384 U.S. 216 (1966), invalidated a statute prohibiting the publication of editorials on election day urging people to vote in a particular way as to the candidates or issues presented to them. The same argument was made in support of that statute that has been made in support of the FCC's rule, *i.e.*, that it promotes fairness by preventing publication of views in circumstances that they cannot be effectively answered. In the *Mills* case this Court found such a justification insufficient to support encroachment on the freedom of the press.

Is Broadcasting Different?

While it is beyond dispute that broadcasting is a part of the "press" and is entitled to the protection of the First Amendment, it is sometimes suggested that there is some peculiarity of broadcasting which warrants greater encroachment on its independence in reporting and commenting on the events of the day. Thus, in upholding the Commission's action in the *Red Lion* case, the Court of Appeals

referred to the fact that "radio inherently is not available to all", emphasized its "unique characteristics", and suggested that the "American people own the broadcast frequencies". (10 R.R.2d 2001 at 2017, 2018).

This Court has never decided, however, that broadcasting is different from other organs of the press sufficiently, and in such a way, as to justify a regulation or dictation of what is to be expressed which would be impermissible if applied to newspapers, magazines, and the like. The concept of ownership of radio frequencies by the people is not a helpful tool in approaching that problem. If anything is to be derived from that concept, it would be as easy to deduce that the government can completely control and dictate what is to be broadcast as it is to arrive at any conclusion short of that.

The characteristic of radio communication which apparently lies at the root of the feeling that more stringent regulation of this part of the press is appropriate is the necessity that different broadcasters not use the same frequency in such a way as to produce interference. But the only conclusion that necessarily follows from this is the conclusion that someone must decide who shall use each frequency. The further conclusion that the government, in addition to parcelling out the frequencies, should limit and control what is broadcast could be justified, if at all, only on the basis that the facilities are so limited and their impact so unique that special limitations, not applicable to other forms of communication, are justified. Specifically, the question posed here is whether the scarcity and uniqueness of broadcast facilities are such as to warrant the particular restrictions imposed by the FCC with respect to "personal attacks."

Analysis of the facts casts considerable doubt on any easy assumption that the characteristics of broadcasting

warrant such limitations. The facts are that the avenues of radio communication are multitudinous and growing in number, that they are more numerous than the voices in the newspaper medium, which is most nearly comparable, and that there is less reason to adopt special protections against "personal attacks" in broadcasting than there is with respect to other media.

In 1965 there were 1751 daily newspapers published in the United States as compared with 5681 broadcasting stations, consisting of 3930 AM radio stations, 1189 FM radio stations and 562 TV stations. The figures for some representative states are as follows:*

	AM	FM	TV	Total Broadcasting	Daily Newspapers
California	223	116	34	373	128
Florida	181	41	17	239	47
Illinois	118	59	20	197	83
Maine	32	5	6	43	9
Nebraska	41	10	13	64	19
New York	149	66	25	240	85
South Dakota	26	2	10	38	12

Comparable figures for the five largest metropolitan areas are as follows:

	1960 Population	Daily Newspapers	Total Broadcasting Stations	AM	FM	TV
New York**	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

* U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966 at pp. 519, 523 (87th ed.).

** In each instance the area referred to is the appropriate Standard Metropolitan Statistical Area (SMSA) as defined by the

An analysis of the situation in the New York Metropolitan Area is instructive.* In that area there are 21 English language daily newspapers,** 9 television stations, and 70 AM and FM radio stations. Many of the 21 daily newspapers have only a small or very local circulation. Thus nine dailies are published in the five counties which make up New York City. Of those nine, however, only three (the *Times*, the *News*, and the *Post*) are of general circulation in the metropolitan area; the other six are published in the other boroughs and have a circulation essentially local. The twelve dailies published outside of New York City consist of nine published in Westchester County, one in Rockland County, and two on Long Island; each of them is the only daily in a "one-daily" town or city; and each of them has essentially a local circulation.***

Broadcasting stations and daily newspapers are comparable media in the sense that each provides current accounts on a daily basis of newsworthy events and activities. It has not been seriously suggested that because newspapers are so few the law of defamation is an insufficient protection against personal attacks so that governmental imposition of fairness is necessary and should be countenanced under the First Amendment. Yet, as the above comparisons show, there are far more broadcasting

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Bureau of the Census. The figures are compiled from COUNTY AND CITY YEARBOOK, 1967, U. S. BUREAU OF THE CENSUS, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACT BOOK, 1966.

* The following discussion is based on the New York Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census and which includes New York City, Nassau, Suffolk, Westchester and Rockland Counties.

** This includes only general coverage newspapers and excludes specialized publications.

*** Compiled from EDITOR & PUBLISHER YEARBOOK, 1966 and BROADCASTING YEARBOOK, 1966.

voices than newspaper voices around the country, and in particular localities.* If constitutional distinctions are to be based on a comparison between the number of newspapers and the number of broadcasting facilities, it should also be noted that the number of newspapers is on the decline and the number of broadcasting stations on the increase.**

Moreover, the need for protection against personal attack, if one exists, must surely be greater with respect to newspapers, and other printed media, than it is with respect to broadcasting. A broadcast attack may be widely or narrowly heard, but in either event it is ephemeral and in many instances not noted or quickly forgotten. The printed slur is lasting, permanently available to do continuing damage to the person attacked. Yet the FCC's rule requires that time for response be given, however negligible the slur, however passing the reference, and however little value to the public there may be in giving expression to the response. Rather than being designed to secure a broadcasting service more in the public interest the Commission's rule seems better calculated to provide a kind of vindication for supposed private rights not available with respect to personal attacks in other segments of the press.

It is apparent that the conclusion cannot easily be reached that the number or character of broadcasting facilities is such as to warrant any qualification, with respect to broadcasting, of the freedom of the press which the First Amendment guarantees.

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* It will be noted that the FCC rule draws no distinction between AM, FM and TV nor does it draw any distinctions based on the number of broadcasting voices in the particular area where the alleged "personal attack" is made.

** U. S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957 (1960), pp. 491-92.

Statutory Authorization

While the question arising under the First Amendment is the most fundamental issue raised by the FCC's action, there are other important issues short of the constitutional question.

There is, first of all, the question whether Congress has provided any statutory authorization for what the Commission has done which is sufficiently explicit to warrant regulation affecting so profoundly the freedom of the press.

The Commission purports to find support for the personal attack rule, and for the action challenged in the *Red Lion* case, in a phrase in Section 315(a) of the Communications Act, introduced into the statute in 1959, providing that nothing in the material added to that section by the 1959 amendment "shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage on news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U.S.C. §315(a) (1964))

At the outset, it is significant that the quoted language did not purport to be an express delegation to the Commission of any particular authority, rulemaking or otherwise. It would be unusual to derive a far-reaching authority to regulate the press from language designed only to prevent an implied repeal.* Moreover, the phrase "reasonable opportunity for the discussion of conflicting views on issues of public importance" hardly amounts to explicit authorization of the personal attack rule or, indeed, program-by-program regulation of any sort.

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* This would be particularly difficult in the light of the specific prohibition of program censorship contained in Section 326 of the Communications Act, 47 U. S. C. §326.

In any event, Congress could hardly have meant to endorse or approve the Commission's policy with respect to personal attacks since that policy was not developed in anything approaching its present form until several years after the 1959 amendment. Insofar as the Commission's Report on Editorializing, published in 1949, referred to personal attacks, it merely suggested that personal involvement in a controversy "may also be a factor" to be considered along with other factors in determining whether "fairness" requires that a particular spokesman be heard. Prior to 1959, the Commission had never imposed a rigid requirement of the sort which it has now adopted.

If the Commission's personal attack rule was not approved or authorized by Congress in its 1959 amendment to Section 315, then the only statutory source for the Commission's action is the "public interest necessity and convenience" clause of the Act. 47 U.S.C. §303 (1964)

It has, of course, been established by this Court's decisions in many cases that, where administrative action impinges upon fundamental rights guaranteed by the Constitution, that action must be supported by an explicit Congressional decision to authorize it if it is to be sustained. *E.g., Hannegan* v. *Esquire,* 327 U. S. 146 (1946); *Kent* v. *Dulles,* 357 U. S. 116 (1958); *Greene* v. *McElroy,* 360 U. S. 474 (1959). As this Court said in the *Greene* case, "Such decisions cannot be assumed by acquiescence or non-action." (360 U. S. at 507)

There is obviously a serious question whether there is anything in the Communications Act, or any amendment to it, which explicitly confers on the Commission the far-reaching power over broadcasting licensees which it has purported to exercise in the *Red Lion* case and in adopting the rule under attack in the Seventh Circuit.

Finally, even if Congress has authorized the Commission to promulgate rules of this sort, there is the further question whether on the record before it, there was a

sufficient factual and evidentiary basis for the adoption of this rule. Neither the record of that proceeding nor anything in the Commission's prior rulings or experience discloses that this rule was adopted in response to a widely-felt or evidenced need or to protect any clearly threatened public interest. Thus, there is no suggestion that the Commission has encountered widespread irresponsibility on the part of broadcasting licensees in their coverage of controversial public issues and personalities. Indeed, the indications are all to the contrary.* Surely, even if the Commission has both constitutional and statutory authorization to regulate broadcasting in this fashion, it should only be done if there is a clear demonstration that governmental action which creates such a threat to the freedom of this segment of the press is warranted by urgent public need.

Consideration of this Case Should be Deferred.

It is submitted that the foregoing is sufficient to demonstrate that the issues presented by the Commission's action in this case, and by its action in adopting the rule under attack in the Seventh Circuit, raise fundamental questions requiring the closest scrutiny by this Court, on the best possible record.

NBC submits that these questions can best be considered by this Court if it defers consideration of the petition in this case until a decision by the Court of Appeals for the Seventh Circuit, and an opportunity to bring that decision before this Court for review. Such action will not unduly delay the consideration of the *Red Lion* petition since,

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* Thus, in a recent address to the International Radio and Television Society, Chairman Hyde of the FCC indicated that he had "not the slightest doubt" that as "a matter of conscience" responsible broadcasters would comply with the political editorial requirement even if there were no rule. (F. C. C. Public Notice—6223, September 21, 1967).

under the briefing schedule agreed upon by all the parties, and approved by the Court, the petitions in the Seventh Circuit can be brought on for hearing there early next year.

The *Red Lion* case presents the application of the FCC's personal attack policy in the context of a particular controversy illustrating the kind of impact which the policy will have upon particular broadcasters. The Commission's action in the *Red Lion* case is undoubtedly illustrative of the manner in which the Commission's rule will be construed and, presumably, the Commission would have reached the same result in the *Red Lion* case if it had arisen subsequent to the adoption of the rule. On the other hand, since the adoption of the rule, it is the rule which will govern future Commission action and it is the rule which has a direct and immediate impact upon all of the Commission's licensees. The validity of the FCC's action in the *Red Lion* case can best be considered against the background of the rule which the Commission subsequently adopted.

It is submitted that the Court should have before it both the rule and the specific application of the Commission's policy before it determines whether the Commission's actions in this area are valid. Moreover, a broader segment of the broadcasting industry is represented before the Seventh Circuit inasmuch as two networks, eight broadcasting companies, and the Radio Television News Directors' Association have all appeared there. Finally, the decision of the Court of Appeals for the Seventh Circuit, after briefing and argument with respect to the impact of the rule, is likely to be of aid to this Court in canvassing the issues which will be presented to it by these two cases.

Conclusion

For the reasons stated, NBC, as *amicus curiae,* respectfully urges the Court to defer consideration of the petition for certiorari herein until after a decision by the Court of Appeals for the Seventh Circuit or, in the alternative, that it grant certiorari and defer briefing and argument on the merits pending such a decision.

Respectfully submitted,

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APPENDIX A

Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§73.123, 73.300, 73.598 and 73.679 (which read identically):

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newcasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	2
Argument	9
Conclusion	13

CITATIONS

Cases:	
Associated Press v. *United States*, 326 U.S. 1	10
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495	9
National Broadcasting Co. v. *United States*, 319 U.S. 190	10
Office of Communication of United Church of Christ v. *Federal Communications Commission*, 359 F. 2d 994	10
Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178	3
Statutes:	
Communications Act of 1934, 48 Stat. 1088, 1091, as amended, 47 U.S.C. 315, 325:	
Sec. 315	2, 4, 11
Sec. 326	2
28 U.S.C. 1254(1)	2
28 U.S.C. 2350(a)	2
73 Stat. 557	4

281-776—67——1

Miscellaneous:

	Page
29 F.R. 10415	5
H. Rep. No. 1069, 86th Cong., 1st Sess.	4
Memorandum Opinion and Order, F.C.C. Dkt. RM–1170	12
Memorandum Opinion and Orders, F.C.C. Dkt. No. 16574	11
Public Notice of July 25, 1963, 25 Pike & Fischer R.R. 1899	4
Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246	2
S. Rep. No. 562, 86th Cong., 1st Sess.	4

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–44a) is not yet reported. The ruling of the Federal Communications Commission, released on October 8, 1965 (J.A. 13–16),[1] is unreported. The Commission's ruling on reconsideration is reported at 1 F.C.C. 2d 1587.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1967, and the petition for a writ of cer-

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

tiorari was filed on September 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

The Fairness Doctrine of the Federal Communications Commission requires that broadcast licensees present responsible spokesmen for both sides of controversial issues of public importance discussed on their stations. It further requires that where an attack is made upon the character or other personal qualities of an individual during discussion of a controversial issue, time must be afforded to that person to reply. The basic question presented is whether the Fairness Doctrine, as applied by the Commission to personal attacks, is consistent with the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitution and of Sections 315 and 326 of the Communications Act of 1934, 48 Stat. 1088, 1091, as amended, 47 U.S.C. 315, 326, are printed in the petition (pp. 3–5).

STATEMENT

This case arises out of the application of the "Fairness Doctrine" of the Federal Communications Commission to a request for time by Fred J. Cook to answer a personal attack against him carried by radio station WGCB, Red Lion, Pennsylvania.

1. The major elements of the Fairness Doctrine, as it relates to this case, were enunciated in 1949. *Report of the Commission in the Matter of Editorializing by*

Broadcast Licensees, 13 F.C.C. 1246.[2] There the Commission, after public hearings, declared that while licensees might advance their own views in broadcast editorials their mandate to maintain "radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (13 F.C.C. at 1248) required them to make their facilities "available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise" (13 F.C.C. at 1250). The Commission explained (13 F.C.C. at 1251):

> We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approxima-

[2] Previous Commission decisions had established the basic policy that licensees could not limit the presentation of views to those with which they agreed. See, *e.g.*, *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178.

tion of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

The Fairness Doctrine was given formal statutory basis in 1959, when Congress, in amending Section 315 of the Communications Act (47 U.S.C. 315) to exempt certain programs from the requirements of that section for affording equal time to opposing candidates for political office, added the following caveat (73 Stat. 557):

> Nothing in the foregoing * * * shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[3]

Under the Fairness Doctrine, the Commission dealt with fairness problems on an *ad hoc* basis, except that it did give general expression to the requirements of the doctrine in cases where a personal attack occurs in connection with a discussion of a controversial issue. Public Notice of July 25, 1963 (25 Pike & Fischer R. R. 1899). And, on July 1, 1964, the Com-

[3] H. Rep. No. 1069, 86th Cong., 1st Sess., explains (p. 5): "[this] is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." See, also, S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8–9, 13.

mission issued a Fairness Primer containing digests of past individual rulings on fairness complaints, 29 F.R. 10415, including a section devoted to the personal-attack aspect of fairness.

This is the general background of the WGCB matter.

2. On February 7, 1965, Cook filed a complaint with the Commission (J.A. 2–5) alleging that WGCB had broadcast a personal attack against him in the syndicated program of the Reverend Billy James Hargis, containing the following statements (J.A. 36):

> Now, this paperback book by Fred J. Cook is entitled, "GOLDWATER—EXTREMIST ON THE RIGHT." Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies * * *. Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing * * * there was a 208 page at-

> tack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency * * * now this is the man who wrote the book to smear and destroy Barry Goldwater called "Barry Goldwater—Extremist Of The Right"!

Cook alleged that he had not been notified of the broadcast by the station and that the station was insisting upon payment as a condition of permitting him to use its facilities to reply. The Commission brought the complaint to the attention of WGCB (J.A. 7). The station responded that it would give Cook free time only if he was unable to pay the regular charge (J.A. 8–9).

By letter of October 6, 1965 (J.A. 13–16), the Commission advised station WGCB that under the Fairness Doctrine the station had a duty to make time available without a showing or representation by Cook that he was financially unable to sponsor or pay for the reply time. The Commission reminded the station that it had a responsibility, where a personal attack was carried on its facilities, to "inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond" (J.A. 15). The Commission further stated (J.A. 15):

> In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63–849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether

> the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

Petitioners' request for reconsideration (J.A. 16–19) was denied on December 9, 1965 (J.A. 20–25), by a letter in which the Commission further explained its views as follows (J.A. 22):

> As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take

other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63–849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

On petition for review by Red Lion, the court of appeals, in an opinion by Judge Tamm, with Judge Miller not participating, and Judge Fahy concurring, affirmed the Commission's order.[4] Judge Tamm re-

[4] Previously, the panel had dismissed the petition on the ground that the Commission's declaratory ruling was not reviewable. Judge Fahy dissented. On petition for rehearing *en banc* by the government and Red Lion, the court of appeals vacated the judgment of dismissal and directed that the case be considered on the merits (Pet. App. 2a).

viewed the background of the Fairness Doctrine and carefully canvassed the issues. He held that the statute contained a permissible and adequately precise delegation of power to the Commission (Pet. App. 24a–29a), that the Fairness Doctrine was not unconstitutionally vague (Pet. App. 34a–38a), and that there was no denial of the right of free speech (Pet. App. 38a–43a). Judge Fahy concurred in the result reached by Judge Tamm and in general with his reasoning, without, however, joining in all of the details of the opinion.

ARGUMENT

1. Petitioners ask this Court to decide whether the Federal Communications Commission's "Fairness Doctrine"—specifically that aspect of it which entitles the victim of a personal attack to free time in which to reply on the station that carried the attack—is consistent with the First Amendment's guarantee of free speech. Although the issue is fundamental and of practical importance to the day-to-day operation of the broadcasting industry, we urge that certiorari be denied, since there is no conflict among the circuits and the decision below is in our view correct.

2. This Court has affirmed that while the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the mode of expression, the special conditions of the medium may affect the "permissible scope of community control" (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502–503). This precept applies with special force to broadcasting. Since the radio spectrum is lim-

ited, government may and must regulate access to it, awarding licenses and regulating licensees so as to promote "the larger and more effective use of radio." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 215–216, 226. One important aspect of this duty is to assure that the airwaves do not become monopolized by one point of view; that the relative handful of licensees which is all the spectrum can accommodate accords a fair hearing to competing positions on significant issues. See *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1009 (C.A.D.C.).

That is the essence of the Fairness Doctrine. It is wholly consistent with the First Amendment, which this Court has declared "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States,* 326 U.S. 1, 20. The refusal of a licensee to present both sides of an issue of public importance cannot be squared with this premise. The Fairness Doctrine contains no restriction upon the licensee's judgment in presenting any program or any view on any subject. The requirement of presenting other views does no more than preserve the public's right to be informed. In so doing, it promotes, not retards, the goals of free speech.

The requirement should not be diluted by conditioning the right of free reply on a showing of inability to pay the station's rates—a rule that would have unfortunate consequences, as the Commission explained (see Statement, *supra,* pp. 7–8). While it is perhaps

arguable that requiring a station to afford free time for replies to personal attacks may have some tendency to deter the station from treating controversial subjects, it has not been the Commission's experience that this is a substantial danger, and it seems clearly outweighed by the far greater dangers to freedom entailed by any rule which would permit stations to use their monopoly of the radio spectrum to suppress views opposed to those they have broadcast.

3. The briefs *amicus curiae* urge that the Court defer disposition of the instant petition pending decision by the Seventh Circuit of several cases which challenge recently promulgated rules of the Commission codifying the Fairness Doctrine in the personal-attack area.[5] We do not agree. If the Court concludes

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[5] In the summer of 1967 the Commission codified the general principles of the Fairness Doctrine as applied to personal attacks and political editorials. The rules require that when a personal attack is made on a person or group during a presentation of views on a controversial issue of public importance, the licensee must notify the party attacked, furnish a transcript, tape or summary and offer the party attacked a reasonable opportunity to respond over the licensee's facilities. The rules do not apply to attacks on foreign parties, to attacks by legally qualified candidates (political campaigns are governed by 47 U.S.C. 315) or to non-editorial bona fide news casts and spot coverage of bona fide news events. *Memorandum Opinion and Orders*, F.C.C. Dkt. No. 16574, adopted July 5, 1967, modified August 2, 1967. Although the rules do not expressly provide for free time, the Commission's Fairness Doctrine would require that it be made available in circumstances parallel to the instant case. The rules are being challenged as unconstitutional in the Court of Appeals for the Seventh Circuit. *Radio & Television News Directors Assn., et al.* v. *United States and Federal Communications Commission*, C.A. 7, No. 16369; *Columbia Broadcasting System, Inc.* v. *United States and Fed-*

—contrary to our submission—that it should review the Fairness Doctrine at the earliest suitable occasion, we submit that the present case affords a more appropriate vehicle than the Seventh Circuit cases, and that to postpone decision in order to await the ruling of the Seventh Circuit would only engender confusion and uncertainty. The present case involves a concrete and focused application of the Fairness Doctrine; while the Seventh Circuit cases present a sweeping attack on necessarily general rules, unilluminated by specific facts. Under normal criteria governing review on certiorari, the concrete controversy is to be preferred. However, we reiterate our view that the Court should decline review of the present case, in light of the soundness of the Fairness Doctrine and the absence, as yet, of any conflict among the court of appeals on the point.

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eral Communications Commission, C.A. 7, No. 16498; and *National Broadcasting Company, Inc.* v. *United States and Federal Communications Commission*, C.A. 7, No. 16499.

In addition, the Fairness Doctrine is being challenged by broadcast interests in review proceedings attacking a Commission decision under the Fairness Doctrine (Memorandum Opinion and Order, F.C.C. Dkt. RM–1170, adopted September 8, 1967) that licensees who carry cigarette advertising must grant broadcast time to parties who believe that cigarette smoking is dangerous. *WTRF–TV, Inc. and Natl. Assn. of Broadcasters* v. *Federal Communications Commmission and United States*, C.A. 4, No. 11,734; *WTRF–TV, Inc. and Natl. Assn. of Broadcasters* v. *Federal Communications Commission and United States*, C.A. 4, No. 11,736; *Sis Radio, Inc.* v. *Federal Communications Commission and United States*, C.A. 4, No. 11,767. An opponent of smoking is also attacking the Commission's failure in Dkt. RM–1170 to require that broadcasters grant time substantially equal to the time used for cigarette advertising. *Banzhaf* v. *Federal Communications Commission and United States*, C.A.D.C., No. 21,285.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM ON BEHALF OF PETITIONERS

This case involves the application of the Federal Communications Commission's "Fairness Doctrine" to a particular broadcast in a specific factual context, at a time when the "Fairness Doctrine" constituted informal and loosely defined Commission policy. The judgment of the Circuit Court of Appeals was entered June 13, 1967. Thereafter, on July 5, 1967, the Com-

mission issued a Memorandum Opinion and Order, 32 Fed. Reg. 10303, amending Part 73 of its Rules and Regulations and adding a new rule purporting to define the obligations of any broadcast licensee when a personal attack is broadcast over its facilities.[1] The validity of the new rule has been challenged on constitutional and other grounds by Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and Radio Television News Directors Association in proceedings now pending in the United States Circuit Court of Appeals for the Seventh Circuit.[2]

In their briefs amicus curiae filed herein, Columbia Broadcasting System, Inc. and National Broadcasting Company, Inc. suggest that the Court hold this case until the decision of the related case now pending in the United States Court of Appeals for the Seventh Circuit, so that the two cases may be considered together. The petitioners concur in this suggestion.

The case at bar concerns the validity of the Commission's personal attack theories in a specific factual context. The proceedings in the Circuit Court of Appeals for the Seventh Circuit present for consideration the validity of rules that will govern all future applications

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[1] The new rule is printed as Appendix A to the brief filed herein by National Broadcasting Co., Inc., as amicus curiae, and at pages 2a-4a in the amicus curiae brief filed by Columbia Broadcasting System, Inc.

[2] Radio Television News Directors Association, et al. v. United States (No. 16,369); Columbia Broadcasting System, Inc. v. United States (No. 16,498); and National Broadcasting Co. v. United States (No. 16,499). These cases have been consolidated. Copies of the brief and exhibit filed by Columbia Broadcasting System, Inc., in the Seventh Circuit were filed with this Court under date of November 21, 1967.

of the personal attack doctrine. It would therefore seem that to avoid piecemeal litigation and to enable the Court to view the entire matter in perspective the two cases should be considered together. It is particularly important, we submit, that there be a definitive resolution of the issue presented, in view of the concession by the respondents that "the issue is fundamental and of practical importance to the day-to-day operation of the broadcasting industry. * * *".[3]

Respectfully submitted,

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[3] Respondent's Brief in opposition to petition for certiorari, page 9.

SUPREME COURT, U. S.

FILED

DEC 6 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENTS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.* and COLUMBIA BROADCASTING SYSTEM, INC.

We agree that the petition for certiorari should be granted. Respondents have consistently urged that this Court consider the present case together with *Red Lion Broadcasting Co.* v. *FCC*, 127 U. S. App. D. C. 129, 381 F. 2d 908, *cert. granted*, 389 U. S. 968 (1967) (No. 2, this Term),[1] and adhere to that position.

[1]See Memorandum Amicus Curiae on Behalf of the Columbia Broadcasting System, Inc.; Brief of National Broadcasting Co., Inc. as Amicus Curiae, both filed last term in *Red Lion* (No. 600, 1967 Term); respondents' Petition for Certiorari Before Judgment in this case last term, No. 993, *Radio Television News Directors Ass'n* v. *United States, cert denied*, 390 U. S. 922 (1968).

We believe, however, that petitioners have sought to frame the issues much more broadly than is necessary to decide this case. Petitioners suggest that the decision below "can only be read as an expression of serious doubt that the [fairness] Doctrine" and the equal political opportunities provisions of Section 315 of the Communications Act, 47 U. S. C. § 315, are constitutional. Pet., p. 8. In fact, the Court of Appeals never reached these questions; it decided only that the rules impose substantial burdens on the broadcasting of facts and opinion about controversial issues and are cast in terms of such uncertain meaning that they contravene the First Amendment. In so deciding, the Court of Appeals expressly stated that it was not prepared to hold the general fairness doctrine (*i.e.*, the requirement by the FCC that broadcast licensees present opposing views on controversial issues) unconstitutional,[2] and it did not even mention the constitutionality of Section 315.

In support of the judgment below, respondents Radio Televison News Directors Associaton, *et al.* and Columbia Broadcasting System, Inc. will present the following questions:

1. Whether, as the Court of Appeals held, the Commission's personal attack and political editorial rules abridge the freedom of speech and press guaranteed by the First Amendment. (This includes the more particular question whether, if the public interest in diversity of broadcast opinion constitutionally justifies any re-

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[2]The Court of Appeals drew "a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine . . . ." The court concluded that "[w]ith that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review." 400 F. 2d 1002, 1017-18.

straints on the freedom of broadcast speech, the present rules are more sweeping and burdensome than necessary to achieve this objective.)

2. Whether, if such restrictions are ever constitutional, the present rules are supported by the requisite Commission investigation and findings that fair diversity of opinion will not reach the public in the absence of such rules.

3. Whether the Commission's rules, if otherwise valid under the First Amendment, are authorized by the Communications Act.

We respectfully suggest that, if certiorari is granted, this case be placed on the Court's regular calendar for argument with *Red Lion*, and that, because of the complexity of the issues and the diversity of views presented, the Court allow full time for argument in each case. Should the Court feel that less than the full time is warranted for both cases, then we suggest that this case be consolidated with *Red Lion* and a total of three hours be allowed, with the time to be divided equally between this case and *Red Lion*.

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IN THE

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OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS
ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS
ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC.

Respondent National Broadcasting Company, Inc. (hereinafter "NBC") agrees that the petition for certiorari should be granted. NBC, along with the other respondents, has previously taken every available step open to it to urge that this Court consider the present case together with *Red Lion Broadcasting Co., Inc.* v. *FCC*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967) (No. 2, this Term).*

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* See Brief of National Broadcasting Co., Inc. as Amicus Curiae filed last term in Red Lion (No. 600, 1967 Term); Respondents' petition for certiorari before judgment in this case last term, No. 993; *Radio Television News Directors Association* v. *United States*, *cert. denied*, 390 U.S. 922 (1968).

Questions Presented

NBC submits that the issues raised by the case and which should be considered by this Court are as follows:

1. Whether the Commission's "personal attack" and "political editorializing" rules are consistent with the First Amendment.

2. Whether the issuance of the rules is within the Commission's authority under the Communications Act of 1934, as amended.

Statement

NBC believes that the Court of Appeals correctly* decided that the Commission's rules impose substantial burdens on the broadcasting of facts and opinion about controversial issues, that they are unreasonable because of both their sweep and vagueness, and that these unreasonable burdens have a sufficiently chilling effect on the broadcast press to be unconstitutional.*

In spite of its view that the ruling of the Court of Appeals is sound and well reasoned, NBC urges that certiorari be granted. This Court has already decided, quite properly in our view, to review the ruling in the *Red Lion*

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* It should be noted that, while the issues considered by the Seventh Circuit are not unrelated to questions posed by other applications of the so-called "fairness doctrine" or by Section 315 of the Communications Act, the Court's only ruling was that the particular rules here challenged burden free expression in a manner which the First Amendment does not permit. The Court specifically refrained from deciding the constitutionality of the fairness doctrine and made no mention of the constitutionality of Section 315. (Cf. Petition for Certiorari of the United States and the Federal Communications Commission, p. 8.)

case.** The issues raised by the *Red Lion* case and by this case are among the most important ever presented to this Court in the area of communications and broadcasting. The manner in which this Court resolves them may have a profound effect on the future course of broadcasting and the relationship between broadcasting and government.

As respondents previously observed in their petition for certiorari before judgment in this case, there are several reasons why consideration of this case along with *Red Lion* will be of assistance to the Court in deciding the proper scope of the Commission's authority in this vital area. Those reasons can be briefly summarized as follows:

1. While this case presents some of the same fundamental issues of the constitutionality and the statutory basis of the Commission's personal attack policy as does the *Red Lion* case, this case contains additional elements which should be considered at the same time. As the United States and the Federal Communications Commission say in their petition for certiorari in this case (page 7):

> ". . . the decision of this Court in Red Lion will not necessarily determine the issues in the present case. Implementation of the Commission's personal attack policy by rule of general applicability and direct en-

---

** In a decision handed down since the ruling in *Red Lion* the Court of Appeals for the District of Columbia Circuit has expressed doubt as to the validity of some of the Commission's policies in this area:

> "It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (*Banzhaf* v. *Federal Communications Commission*, United States Court of Appeals for the District of Columbia Circuit, November 21, 1968, Slip Opinion, pp. 31-32).

forceability might be considered as involving questions distinguishable from those raised by the issuance of an *ad hoc* ruling bearing no direct sanctions."

As we observed in our previous petition, the principal inhibitory effect upon speech is felt at the time the programs are selected and scripts are prepared, when the broadcaster has the rules and other expressions of the policy before them and not the specificity of a particular after-the-fact directive. Moreover, the only formal sanction for the violation of the order in issue in *Red Lion* was denial of renewal of Red Lion's license when it expired, whereas violation of the rules challenged here invokes possible liability, on a case-by-case basis, for civil forfeitures, criminal fines, and cease-and-desist orders, in addition to loss of license.

2. The rules challenged here involve the Commission's policy requiring a station that broadcasts editorials supporting or opposing a political candidate to notify each disfavored candidate, supply a copy of the editorial, and offer free broadcast time for reply, a policy not involved in *Red Lion*.

3. The impact of the Commission's personal attack and political editorializing doctrine will not be confined to only a few isolated licensees; its chilling effect will be felt by all broadcast journalists. It is therefore essential that, in deciding the important questions presented here, the Court have before it parties representative of the networks, stations and broadcast journalists upon whom the impact of the Commission's policy falls.

4. This case presents a more complete record than the bare exchange of letters giving rise to the *Red Lion* litiga-

tion because it resulted from a formal rule-making proceeding and shows the anticipated effect of the Commission's rules on all broadcast journalists.

CONCLUSION

In view of the considerations set out above, and in view of the novelty and complexity of the questions presented, and the major impact which a decision in the case will have on the vigor and quality of the discussion of public affairs in the United States, we respectfully request that certiorari be granted, that this case be placed on the Court's regular calendar as was done in *Red Lion*, and that full time be allowed for the argument of each case.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC. and
REVEREND JOHN M. NORRIS, *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO PRESENT ORAL ARGUMENT ON BEHALF OF RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. AS AMICI CURIAE

---

1. Pursuant to Rule 44(7) of the Rules of this Court, movants (the *"amici"*) request that leave be granted for one-half hour of oral argument on behalf of the

amici, in addition to the time for argument allotted to petitioners.

2. This motion is made on behalf of Radio Television News Directors Association and eight licensees of radio and television stations[1] (hereinafter "RTNDA, *et al.*"); Columbia Broadcasting System, Inc. ("CBS"); and National Broadcasting Company, Inc. ("NBC"). If this motion is granted, the oral argument on behalf of all of them will be presented by Archibald Cox, Esq.

3. On December 4, 1967, when certiorari was granted in *Red Lion*, the *amici* were parties to three consolidated cases in the United States Court of Appeals for the Seventh Circuit, in which they sought review of the new "personal attack" and "political editorial" rules adopted by the Commission.[2] On January 6, 1968, the *amici* filed a petition for a writ of certiorari before judgment to the Seventh Circuit (*Radio Television News Directors Association* v. *United States*, No. 993, this Term). Respondents have conceded that the Seventh Circuit cases present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness and personal attack policies as does *Red Lion*.

4. If the petition for certiorari before judgment is granted, a grant of this motion will be unnecessary, and the moving parties will forego *amicus* participation

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[1] Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc.

[2] FCC Rules and Regulations, §§ 73.123, 73.300, 73.598 and 73.679, 32 Fed. Reg. 10303-06, as amended at 11532 (1967).

here, since they can be fully heard in No. 993. Otherwise, RTNDA, *et al.*, CBS and NBC will each file an *amicus* brief in this case urging reversal of the judgment below. The *amici* have been advised by counsel for respondents and petitioners that they will consent to the filing of briefs by the *amici*.

5. The *amici* have requested that counsel for petitioners agree to share with them the time allotted for argument on behalf of the petitioners; that request has been refused. We are authorized to state, however, that counsel for petitioners has no objection to the grant of this motion.

6. The Commission's fairness and personal attack policies pose fundamental First Amendment issues. The issues have great practical importance in the day-to-day operations of stations, networks, journalists and others engaged in broadcasting. We respectfully submit that in deciding this case the Court should be aware of the total impact of the Commission's policies upon broadcast discussion of public issues and the effect which this Court's decision is likely to have on the entire industry.

7. Petitioner Red Lion is a single AM-FM broadcast licensee operating in a small Pennsylvania community. It is not, we believe, representative of broadcasters generally. Nor are the particular facts of this case typical of the fact situations which are constantly being presented to the Commission for action under its fairness and personal attack policies. It cannot be assumed that the defense made by this single licensee will lay bare the full ramifications of the Commission's policies or their impact upon members of the industry other than Red Lion.

8. In deciding issues so charged with consequences for the entire broadcast industry, the Court would be assisted, we submit, by hearing oral argument not only on behalf of this single licensee, but also on behalf of a substantial segment of the industry. We recognize that our argument as *amici* would have to be directed to the issues in the *Red Lion* case; that is the reason we believe that grant of the petition for certiorari in No. 993 would best assure the full presentation of the interrelated questions in the two cases. But even within the limitations of the precise issues in *Red Lion*, we believe that the *amici* can illuminate the broader implications of those issues in a manner helpful to the Court.

9. The *amici* constitute a considerable segment of the broadcasting industry. CBS and NBC operate both nationwide radio and television networks and individual television and radio stations scattered across the country. RTNDA is a non-profit, unincorporated association of more than 1,000 news directors and other persons actively engaged in the reporting, writing or editing of news for radio and television stations or networks in the United States and Canada. And the other eight *amici* are licensees of 39 radio and television stations located in large and small communities throughout the United States. The views of the *amici* are thus broadly representative of the industry as a whole.

WHEREFORE, the *amici* respectfully request that, unless this Court grants their petition for certiorari before judgment in No. 993, this Term, it grant them

leave under Rule 44(7) to present oral argument in this case for one-half hour.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions	2
Statutes	2
Regulations	4
Question Presented for Review	4
Statement of the Case	5
Summary of Argument	13
Argument	18
Conclusion	38

CITATIONS

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) .. 6
Bates v. Little Rock, 361 U.S. 516 (1960) 33
Cantwell v. Connecticut, 310 U.S. 296 (1940) 32
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) 21
Farmers Union v. WDAY, 360 U.S. 525 (1959) 28
Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) 34
Grosjean v. American Press Co., 297 U.S. 233 (1936) .. 18
Hague v. C.I.O., 307 U.S. 496 (1939) 30, 31
Hannegan v. Esquire, 327 U.S. 146 (1946) 31
Keyishian v. Board of Regents, 385 U.S. 589 (1967) ... 27
Lamont v. Postmaster General, 381 U.S. 301 (1965) .. 29, 31
Lovell v. Griffith, 303 U.S. 444 (1938) 31
Mills v. Alabama, 384 U.S. 214 (1966) 33

Page

NAACP v. Alabama, 357 U.S. 449 (1958) 33
National Broadcasting Company v. United States, 319 U.S. 190 (1943) 16, 29, 30, 33
Near v. Minnesota, 283 U.S. 697 (1931) 18, 32
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..21, 32
Red Lion Broadcasting Co., Inc. v. F.C.C., 381 F. 2d 908 (1967) 1, 22, 29, 36
Roth v. United States, 354 U.S. 476 (1957) 19, 31
Schneider v. State, 308 U.S. 147 (1939) 31
Smith v. California, 361 U.S. 147 (1959) 19, 23, 29
Speiser v. Randall, 357 U.S. 513 (1958) 20
Superior Films v. Department of Education, 346 U.S. 587 (1954) 18
Talley v. California, 362 U.S. 60 (1960) 20, 33
Thomas v. Collins, 323 U.S. 516 (1945) 26, 30
Thornhill v. Alabama, 310 U.S. 88 (1940) 19
United States v. International Union, 352 U.S. 567 (1957) 30, 32
United States v. Paramount Pictures, 334 U.S. 131 (1948) 18
Winters v. New York, 333 U.S. 507 (1948) 32

STATUTES:

5 USC 1009(c)(e) 2
5 USC 1032 2
5 USC 1040 2
28 USC 1254(1) 2
47 USC 303(g) 2, 36
47 USC 308, 309 23
47 USC 312(a) 23
47 USC 315(a) 3, 13, 17, 27, 36, 37
47 USC 326 4
47 USC 402(b) 2
47 USC 503(b) 23
P.L. 86-274; 73 Stat. 557, September 14, 1959 .....3, 28

MISCELLANEOUS:

Page

Chafee, Government & Mass Communications (1947) 18, 23, 34

Clayton W. Mapoles, 23 Pike & Fischer, R.R. 586 (1962) 37

Constitution Amendment I 2

Fairness Primer, 29 Fed. Reg. 10415 (1964) 37

Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 .....22, 35

FCC Public Notice, July 26, 1963, FCC 63-734; 25 P & F Radio Reg. 1899 (1963) 4

FCC Rules & Regulations, Secs. 73.35(b), 73.240(a)(2), 73.636(a)(2) 35

In the Matter of Petitions of Columbia Broadcasting System, Inc. and National Broadcasting Co., 26 FCC 715 (Lar Daly) 27, 37

James Reston, New York Times, Friday, December 22, 1967 25

Senate Report No. 562, July 22, 1959 .....28, 37

U.S. Bureau of the Census Statistical Abstract of the United States, 1967 (88th Ed.) Nos. 737, 746 35

Webster's New World Dictionary 26

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No. 600

RED LION BROADCASTING CO., INC., ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of Circuit Judge Tamm and Circuit Judge Fahy of the United States Court of Appeals (A19) are reported, *Red Lion Broadcasting Co., Inc., et al.* v. *Federal Communications Commission, et al.*, U.S. App. D.C. , 381 F.2d 908.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 13, 1967. The petition for certiorari was filed September 11, 1967 and granted December 4, 1967.

The jurisdiction of this Court is invoked under 28 USC 1254(1) and 5 USC 1040. The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Sec. 402(a) of the Federal Communications Act of 1934 as amended, 47 USC 402(b), and 5 USC 1009(c), 1009(e), and 5 USC 1032.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutes

COMMUNICATIONS ACT OF 1934, AS AMENDED.

Sections 303(g), 315(a), 326;
47 USC 303(g), 315(a), 326

Section 303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. *Appearance by a legally qualified candidate on any—*

(1) *bona fide newscast,*

(2) *bona fide news interview,*

(3) *bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary),* or

(4) *on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),*

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[1]

---

[1] Portion in italics added by amendment approved September 14, 1959, Public Law 86-274; 73 Stat. 557.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 326. Censorship.

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Regulations

Federal Communications Commission Public Notice, July 26, 1963, FCC 63-734; 25 P & F Radio Reg. 1899 (1963)

(A) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response. (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer RR 951, 953).

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment rights of the petitioners, owners and operators of a radio broadcasting station, are abridged by an order of the Federal Communications Commission, pursuant to the Commission's

"personal attack" doctrine, requiring the petitioners, in the case of a person who during a broadcast over the petitioners' station is the subject of a "personal attack", as defined by the Commission, to furnish to such person a tape recording, transcript or summary of the attack, and thereafter to offer him without charge comparable time in which to respond; these obligations being imposed upon the petitioners irrespective of the truth or falsity of the statements contained in the attack, and without regard to the fact that the petitioners may have broadcast them in good faith, believing them to be true.

STATEMENT OF THE CASE

The petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, at Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. (A5) They petitioned the United States Court of Appeals for the District of Columbia Circuit to review an order of the Federal Communications Commission, directing the petitioners to grant free time over petitioners' radio station to one Fred J. Cook, so that he might respond to a personal attack made on him over the facilities of these stations by one Reverend Billy James Hargis. The challenged order required petitioners to furnish Mr. Cook a transcript, recording or summary of the broadcast in question and to grant him free time even though he was financially able to pay for the time. (A5) The case was heard in the Circuit Court of Appeals before Senior Circuit Judge Wilbur K. Miller, and Circuit Judges Fahy and Tamm. The Court of Appeals affirmed the action of the Federal Communications Com-

mission. Circuit Judge Tamm filed an opinion. Circuit Judge Fahy filed a separate opinion concurring in the result. Senior Circuit Judge Miller did not participate in the consideraiton and decision of the case on the merits.[2]

In November 1964 petitioners broadcast a 15-minute program by Reverend Billy James Hargis as part of a series entitled *The Christian Crusade.* (A32, 37, 60) The program included a discussion of the 1964 Presidential election and of a book by Mr. Fred J. Cook about the Republican campaign, entitled "Goldwater—Extremist on the Right". (A37, 60, 93) As part of the broadcast Reverend Hargis made the following statements concerning Mr. Cook:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan." (A38)

The Hargis program was broadcast by a number of other stations located in various parts of the country.

---

[2] The panel consisting of Judges Miller, Fahy and Tamm, with Judge Fahy dissenting, had previously concluded that the challenged rulings of the Commission were declaratory only, and not orders from which an appeal might be taken, and the panel accordingly dismissed petitioners' action. (A82, 86, 90) Thereafter a majority of the Court *en banc* voted to vacate the opinion and judgment filed by the panel and directed the assigned division to consider the petitioners' action upon the merits. (A90, 92) *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, decided May 22, 1967, has sustained the position of Judge Fahy and the majority of the Court on the jurisdictional point.

(A26-29) Thereafter Mr. Cook wrote to Station WGCB, quoting from the Hargis broadcast, and stating:

> "* * * *
>
> "The purpose of this inquiry is two-fold:
>
> "(A) Since your station is listed as one of those that has carried the Rev. Billy James Hargis' Christian Crusade broadcasts, did you in fact put on the air this attack against me made by the Rev. Billy James Hargis? I expect an answer, yes or no.
>
> "(B) If you did, this is to serve notice that I shall expect you to grant me equal time, at your expense, as provided in FCC regulations, to answer in appropriate fashion this slanderous and libelous attack." (A33, 34)

In response petitioners furnished Mr. Cook with the WGCB rate card so that he could arrange for the time he might wish to purchase. Petitioners also sent Mr. Cook copies of letters which they had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. (A34, 35) After a further exchange of letters between Mr. Cook and WGCB he filed a complaint with the Federal Communications Commission. In his complaint Mr. Cook charged that Station WGCB had broadcast a "personal attack" against him by Reverend Hargis, without notifying him of the attack or furnishing him with a transcript or summary either before or after the program was aired, and that the station had refused his request for free time to respond to the attack. (A37)

The Commission brought Mr. Cook's complaint to the attention of the petitioners and requested an answer

within twenty days. (A31) In their response the petitioners stated their understanding to be

> "* * * that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to 'sponsor' or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.
>
> "The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to 'sponsor' or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. * * *" (A32, 33)

To these statements the Commission answered:

> "The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack '. . . on an individual's or group's honesty, character, integrity, or like personal qualities . . .' in connection with a controversial issue of public importance. See part E, Personal Attack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance', 29 F.R. 10415, 10420-21. A copy of this document is enclosed.
>
> "Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate

a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid., The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should be Fun' Inquiry, 33 FCC 101, 107.

"In this case the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

"In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.,* FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and 'elemental fairness' not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

"In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is

financially unable to sponsor or pay for his reply time.

"Accordingly, you are requested to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to the situation." (A38, 40).

The petitioners requested the Commission to reconsider its ruling. They pointed out that prior to the Hargis broadcast Mr. Cook in a magazine article had attacked Mr. Hargis, his program, and his organization. The petitioners also requested "a ruling by the Commission on the constitutionality of the 'fairness doctrine' as applied to the instant situation." (A40-43). The Commission thereafter reaffirmed its ruling, stating in part (A44-49):

"* * *

"As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity

to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

"There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

"For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

"* * *"

In response to the petiitoners' request for a ruling as to the constitutionality of its "fairness doctrine" the Commission stated (A 48):

"* * *

"4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that dis-

cussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

"We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

"The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's 'honesty, character, integrity or like personal qualities.' See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

"A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broad-

casting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing*, 13 F.C.C. 1246-1270, par. 6.

"Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest 'in the larger and more effective use of radio' (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC v. United States*, 319 U.S. 190, 227." (A48, 49)

The Court of Appeals sustained the Commission's action, holding that it was authorized by the Communications Act, and in particular by Section 315(a), 47 USC 315(a), and did not violate the petitioners constitutional rights. (A 128-132)

SUMMARY OF ARGUMENT

Radio and radio broadcasters are included in the press whose freedom is guaranteed by the First Amendment. The fundamental purpose of the Amendment is to prevent previous restraints on publication, and, in particular, legal devices and doctrines which in their application have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. This Court has been strict and vigilant in striking down such devices and doctrines, which require a man to speak at his peril and to engage in self-censorship by making only bland statements that steer clear of an unlawful zone.

The ruling and order applied to the petitioners by the Commission constitute a doctrine and device offensive to these principles and to the First Amendment. The Commission has imposed upon the petitioners the burden of seeking out the subject of a "personal attack" broadcast over the petitioners' radio station, furnishing him a copy, recording or summary of the

offending broadcast, and thereafter providing him free time in which to respond. This burden is imposed on the petitioners, even though the statements contained in the broadcast may have been true or may have been made and broadcast in the good faith belief that they were true, so that the person who made the attack is immune from a suit for libel. In addition, the petitioners are subject to the imposition of sanctions by the Commission in the event they fail to comply with the Commission's order.

The Commission's order goes beyond a "previous restraint" on free speech. It dictates to the petitioners as to what the contents of a program shall be and who the speaker shall be. No matter how fairly and completely the petitioners in other programs and broadcasts may have presented the case for the subject of the "personal attack", they are told that he, and he alone, must be given time for a reply. This is precisely the "dictation as to what should go into particular programs" which Chafee accurately characterizes as "the sort of censorship which went on in the seventeenth century in England."

The ruling applied to the petitioners applies with equal force to radio commentators, news interview programs, and documentary programs. Such programs contain many statements which can be construed as "personal attacks" upon individuals or groups. To steer clear of the difficulties and expense resulting from "personal attacks" the participants in these programs will be constrained to confine their remarks to praise and platitudes.

The inhibitory force of the Commission's "personal attack" doctrine is enhanced by its vagueness. The definition of a "personal attack" as "an attack on an

individual's or group's honesty, character, integrity, or like personal qualities" is broad enough to include almost any criticism of an individual's actions or activities. This Court has condemned such broadly worded restrictions upon the ground that they offer no security for full discussion, blanket with uncertainty whatever may be said, and compel a speaker to hedge and trim.

The Commission and the Congress have recognized the inhibitory impact of a rule requiring broadcasters to grant free time. Thus, it was recognized in 1959 that "a blackout in the presentation of legally qualified candidates in the news-type programs" would result from a ruling by the Commission that a television station which used a brief newsclip of a candidate's activities was required to grant equivalent free time to all opposing candidates to use the station as they saw fit. To correct this interpretation of the Communications Act by the Commission the Congress amended the Act.

In summary, the inevitable result of the Commission's "personal attack" rule as applied to the petitioners will be that broadcasters will tread cautiously, staying as far as possible from the dangerous and ill-defined zone labeled "personal attack". In order to be safe, radio stations and broadcasters will be required to be bland and innocuous. The resulting self-censorship, imposed by the Commission, will be none the less virulent for having been self-administered. Such a regime is at war with the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment.

The fact that as licensees the petitioners are subject to regulation does not justify the Commission in abridg-

ing the exercise of free speech over the petitioners' radio station. First Amendment rights may not be denied merely because they are tangled with conduct which the government may regulate. The Court has applied this principle in striking down, as abridgments of First Amendment rights, restrictions on conduct on the public streets and in public parks, and attempts to impose conditions upon the use of the mails.

The Commission cannot justify its "personal attack" rule by limiting its applicability to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." Such a personal attack stands on no different footing, and is entitled to no lesser protection under the First Amendment, than any other speech.

In any event, the Commission has completely failed to demonstrate that there is any overriding or compelling public interest which requires the imposition of restraints or sanctions upon radio broadcasts of personal attacks. That the Commission thinks such regulation desirable and in the public interest is not conclusive. In many cases this Court has disagreed with similar judgments by state legislatures or municipal authorities.

The Commission is mistaken in its reliance upon statements in the opinion of Mr. Justice Frankfurter in *National Broadcasting Company* v. *United States,* 319 U.S. 190, 215, 216, 226, 227 (1943), which the Commission claims justify its "personal attack" rule. Read in context, these statements do not support any attempt to control the contents of programs or impose any previous conditions or restraint upon broadcasts; they mean only that the Commission may pass upon the

character of the persons participating in broadcasting and regulate their methods of competition.

The Commission is also mistaken in its reliance upon the fact that the number of broadcast frequencies is limited, from which fact the Commission apparently reasons that broadcasting facilities are also limited, and this being so the Commission may impose upon broadcasters conditions and restraints that would not be permissible in the case of newspapers. The Commission argues that such regulation of broadcasting is necessary in the public interest, to assure that programs are fair and balanced and present both sides of controversial issues. The petitioners submit that First Amendment rights may not be abridged, whether the number of broadcast stations be large or small. In any event the fact is that there are 6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1. Diversity of speech and opinion on the air is therefore assured, without interference by the Commission.

If Section 315(a) of the Communications Act of 1934, 47 USC 315(a), as amended in 1959, or any other provision of the Act, purports to authorize the Commission's order, then for the reasons set out above the statute is *pro tanto* unconstitutional. However, contrary to the contention of the Commission in the court below, the history of the 1959 amendment to Section 315(a), as disclosed in committee reports, clearly demonstrates that the amendment was not intended to authorize, and did not authorize, the Commission's "personal attack" ruling, which was not promulgated until 1962.

ARGUMENT

The Ruling and Order of the Federal Communications Commission, as Applied to the Petitioners, Constituted an Abridgement of Freedom of Speech and of the Press in Violation of the Petitioners' First Amendment Rights

There can be no doubt that radio and radio broadcasters are included in the press whose freedom is guaranteed by the First Amendment. *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948); *Superior Films* v. *Department of Education,* 346 U.S. 587, 589 (1954).[3] As Chafee put it, speaking of the impact of the Amendment on the Federal Communications Commission

> "Specifically the First Amendment prevents the FCC from engaging in two kinds of activity. The first of these embraces what Congress had in mind when it forbade the Commission to exercise 'censorship' over radio communications. This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular programs. Such supervision of details is in no way part of the Commission's job of allocating wave lengths. On the other hand, the statute does not forbid evaluation of the total performance of a station, which is an incidental feature of this job of parceling out the air." Chafee, Government & Mass Communications (1947), page 641 (footnote omitted)

The fundamental purpose of the First Amendment is to prevent previous restraints upon publication. *Near* v. *Minnesota,* 283 U.S. 697 (1931). "The free-

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[3] Moreover, the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fifth Amendment. Cf. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

dom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama,* 310 U.S. 88, 101, 102 (1940); *Roth* v. *United States,* 354 U.S. 476, 488 (1957). And this Court has on many occasions condemned, as previous restraints, "legal devices and doctrines" which in their application "have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith* v. *California,* 361 U.S. 147, 150, 151 (1959). The Court has been both strict and vigilant in striking down such devices and doctrines. As the Court said in *Smith* v. *California,* 361 U.S. 147, 151, 155

> "* * * And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 US 507, 509, 510, 517, 518, * * *
>
> "We have said: 'The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' Roth v. United States, supra (354 US at 488). * * *."

Applying these principles the Court in *Smith* v. *California,* 361 U.S. 147 (1959), struck down an ordinance making it unlawful for a bookseller to have in his

store any obscene book, even though he was not aware of the contents of the book.

> "For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S. 153

Again in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the Court held unconstitutional, as an abridgement of freedom of speech, a provision of the California Constitution which denied a tax exemption to one who declined to swear that he did not advocate the overthrow of the government of the United States or of the State by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities. The Court said:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." 357 U.S. 518

Similarly, the Court held invalid an ordinance forbidding the distribution of any handbill which did not have printed thereon the name and address of the person who prepared, distributed or sponsored it. *Talley* v. *California,* 362 U.S. 60 (1960). The Court said (362 U.S. 64):

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."

Further safeguarding freedom of speech and of the press the Court held in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967), that one who makes a personal attack upon a public figure is immune from a suit for damages for libel unless he speaks or writes with actual malice—that is with knowledge that his statement is false, or with reckless disregard of whether it is false or not. In so ruling the Court took into consideration the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan,* 376 U.S. 254, 270. Rejecting a rule compelling the critic of official conduct to prove the truth of his factual assertions, the Court held (376 U.S. 279) that such a rule would lead to "self-censorship", for "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

When these principles are applied to the device and doctrine invoked by the Commission in its order to the petitioners it is apparent that the actions of the Commission are in violation of the First Amendment rights of the petitioners. The petitioners have been told by the

Commission that having carried on their radio station a program containing a "personal attack" on Mr. Cook they must seek him out, furnish him a copy, recording or summary of the broadcast and grant him free time for reply, irrespective of his ability to pay. This obligation is imposed upon the petitioners, even though the statements contained in the "personal attack" may have been true, (see opinion of Judge Tamm, A121, 381 F. 2d 925) or may have been broadcast in the good-faith belief that they were true. At the same time, under the rule of the *New York Times* and *Butts* cases, Mr. Hargis, who made the attack on Mr. Cook, is immune from a suit for damages for libel unless Mr. Cook can prove that the Hargis statements were false and were made with knowledge of their falsity or with reckless disregard of whether they were true or not.

Thus, the petitioners are subjected to a burden[4] or penalty, consisting of the expense involved in locating the subject of the personal attack, furnishing him with a script, recording or summary of the broadcast, and thereafter granting him free time in which to reply—time which otherwise might be allocated to a paying sponsor. Furthermore, and equally important and menacing, is the fact that failure to comply with the Commission's order may ultimately result in the im-

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[4] Judge Tamm in his opinion concedes that "* * * I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one." A124, 381 F.2d 926. Cf. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449: "Not only does a 'balancing' first amendment fail to protect freedom of speech, but it becomes a mechanism for rationalizing and validating the kind of governmental action intended to be prohibited.

"Such are the consequences of distorting the amendment's thunderous 'Thou shalt not abridge' into a quavering 'Abridge if you must, but try to keep it reasonable' ".

position of sanctions against the petitioners by the Commission.[5]

Indeed, the Commission's ruling goes beyond a previous restriction; it dictates to the petitioners what the contents of a future program must be, and who the speaker must be. Even though the petitioners may have broadcast a full and fair presentation of conflicting views with respect to Mr. Cook, his activities and his writings, and Mr. Hargis and his program, this will not satisfy the Commission. The petitioners are ordered to permit Mr. Cook himself to reply to the attack on him. This we submit is precisely the "dictation as to what should go into particular programs" and "supervision of details" which Mr. Chafee accurately characterizes as "the sort of censorship which went on in the seventeenth century in England." (Chafee, Government and Mass Communications (1947), p. 641)

As Mr. Justice Frankfurter put it in his concurring opinion in *Smith* v. *California,* 361 U.S. 147, 161, 162 (1959), "* * * a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions beyond its particular facts." We therefore briefly consider the implications of a decision sustaining the action of the Commission in this case.

The doctrine applied by the Commission in its ruling, as stated in its letter of October 6, 1965 to the petitioners, is (A38, 39):

> "* * * The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack.

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[5] By revocation of license (47 U.S.C. 312(a)), denial of application for renewal (47 U.S.C. 308, 309) and possibly by financial penalties (47 U.S.C. 503(b)).

> The latter is defined in our recent fairness primer as an attack '. . . on an individual's or group's honesty, character, integrity, or like personal qualities . . .' in connection with a controversial issue of public importance. See part E, Personal Attack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance', 29 F.R. 10415, 10420-21. A copy of this document is enclosed.
>
> "Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should Be Fun' Inquiry, 33 FCC 101, 107."

As Columbia Broadcasting System, Inc., has pointed out in its brief and exhibits filed amicus curiae in support of the petition for certiorari, the ruling applied to the petitioners would apply with equal force to radio commentators, news interview programs, and documentary programs. Examples of such programs are Mr. Eric Sevareid's commentary, the news interview program, Face the Nation, conducted by Mr. Martin Agronsky, and the CBS news documentary programs, such as CBS Reports and CBS News Specials. Such programs must inevitably contain, and in fact do contain, many statements which can be construed as "personal attacks" upon individuals or groups.[6]

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[6] See Memorandum amicus curiae on behalf of the Columbia Broadcasting System, Inc., and pp. 23 et seq. of the brief for Columbia Broadcasting System, Inc., in No. 16,498, United States Court of Appeals for the Seventh Circuit, filed as an exhibit with this Court.

The chilling effect of the Commission's ruling on such commentators and programs is obvious. If Mr. Sevareid, for example, questions a politician's sincerity does this constitute an attack on that individual's "honesty, character, integrity or like personal qualities" and must every station carrying the Sevareid broadcast make available free time for him to reply?[7] If a guest on Face the Nation asserts that a public official has been responsible for a "credibility gap" must the network make free time available to the official in question? How much time must be offered in these cases? What other scheduled program or program material must be displaced or deleted to provide the necessary time? The pressure on commentators and broadcasters will be great, to steer clear of such questions and guard against the difficulties and expense resulting from a "personal attack", by confining their remarks to praise and platitudes.

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[7] Mr. James Reston in his column in the New York Times, Friday, December 22, 1967 notes that:

> "• • • when President Johnson said on his latest national TV broadcast that he 'didn't know what the effect of the Kennedy-McCarthy movement is having in the country' but that he did 'know of the interest of both of them in the Presidency and the ambition of both of them,' Senator Eugene McCarthy's campaign manager demanded that the three major TV networks give the Senator a half hour of free time on the ground that this was a 'personal attack' on the Senator. C.B.S. is saying no and for good reasons."

Mr. Reston comments:

> "What is 'an attack?' How do you define 'honesty, character, integrity or like personal qualities? Suppose Eric Sevaried, in a moment of reckless impetuosity, were to suggest one night that Jimmy Hoffa and Bobby Baker are men of dubious character, and Jimmy objects—is C.B.S. to set up a color camera in jail and let Mr. Hoffa proclaim his integrity to the nation?"

The inhibitory force of the Commission's "personal attack" doctrine is enhanced by its vagueness. What constitutes an attack "on an individual's or group's honesty, character, integrity or like personal qualities"? Among the relevant definitions of "character" contained in Webster's New World Dictionary (1957) are: "moral constitution; moral strength; self-discipline, fortitude, etc." Applying these definitions it would seem that almost any criticism of an individual's activities or actions might well be construed as an attack upon his "character". Furthermore, the Commission has expanded the boundaries of the dangerous ground almost to infinity by adding "like personal qualities" to the catalogue of personal traits which are covered by its doctrine.

The inhibitory effect on free speech of broadly worded restrictions is well illustrated by *Thomas* v. *Collins*, 323 U.S. 516 (1945). That case involved a Texas statute requiring a labor organizer to register and procure an organizer's card from a State official before "soliciting" persons to become members of a labor union. Holding the statute unconstitutional when applied to a speech by the president of a union, the Court said (323 U.S. 535):

> "Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of

whatever inference may be drawn as to his intent and meaning.

> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Keyishian v. *Board of Regents of New York*, 385 U.S. 589 (1967), is likewise instructive. In that case the Court struck down a New York plan requiring or authorizing the removal of members of the faculty of state institutions who were guilty of "treasonable" or "seditious" utterances or acts. The Court said (385 U.S. 589, 601):

> "* * * The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.'"

The Federal Communications Commission and the Congress have recognized the inhibitory impact of a rule requiring broadcasters to grant free time. In 1959 the Commission in the so-called *Lar Daly* case[8] held that Section 315(a) of the Communications Act of 1934 obliged a television station which used a brief newsclip of a candidate's activities—without the candidate's prior knowledge or consent—to provide equivalent free time to all opposing candidates to use the sta-

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[8] In the Matter of Petitions of Columbia Broadcasting System, Inc., and National Broadcasting Co., 26 FCC 715.

tion as they saw fit. Congress promptly overturned this ruling by amending Section 315(a). Public Law 86-274; 73 Stat. 557 (1959). In its report on the amendatory bill (S2424) the Senate Committee on Interstate and Foreign Commerce pointed out that the result of the Commission's ruling would be "a blackout in the presentation of legally qualified candidates in the news-type programs." The Committee stated:

> "Even the Federal Communications Commission recognizes that its present rigid interpretation of equal opportunity under Section 315 does constitute a deterrent to stations permitting the use of their facilities by legally qualified candidates. The inevitable consequence is that a broadcaster will be reluctant to show one political candidate in any news-type program lest he assume the burden of presenting a parade of aspirants." Senate Report No. 562, July 22, 1959.

In summary, the inevitable result of the Commission's "personal attack" ruling as applied to the petitioners will be that broadcasters will tread cautiously, staying as far as possible from the dangerous and ill-defined area labeled "personal attack". In order to be safe, radio stations and broadcasters will be required to be bland and innocuous, for if a mistake is made, and what the Commission construes as a "personal attack" is committed, the radio station, and every station carrying the broadcast, will be required to grant free time for a response, and perhaps to a parade of respondents.[9] The resulting self-censorship, imposed by the Commission, will be "hardly less virulent for

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[9] Cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 530 (1959): "Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution."

having been privately administered." *Smith* v. *California,* 361 U.S. 147, 154 (1959). Adopting the language of Mr. Justice Douglas in *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965), we submit that such a regime "is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270."

The Grounds Upon Which the Commission Seeks To Justify Its "Personal Attack" Doctrine Are Untenable

The argument of the Commission in the Court below, which was accepted by the Court and presumably will be repeated here, was that

> "Radio broadcasters, * * * by utilizing the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, id est, the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. * * *" (Opinion of Judge Tamm, A127, 128; 381 F2d 928)

The Commission's reasoning is that being subject to regulation broadcasters as a corollary may be subjected to the "personal attack" rule. The argument, we submit, involves a non sequitur. While it is of course true that radio broadcasting is subject to governmental regulation (*National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943)) it does not follow that the right to regulate is unlimited, and surely it cannot be said

that regulation may abridge the exercise of freedom of speech and of the press by a radio station or broadcaster, by controlling or dictating the contents of programs, directly or indirectly, or by imposing previous restraints upon free speech over radio.

This Court is familiar with the argument that one who uses a public facility under a license subjects himself to regulations abridging his right of free speech. As Mr. Justice Jackson observed in his concurring opinion in *Thomas* v. *Collins,* 323 U.S. 516, 547 (1945):

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."

The Court has consistently held, however, that "when the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistance is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311. Or as the Court said in *De Jonge* v. *Oregon,* 299 U.S. 353, 364, 365, when speaking of First Amendment rights, '. . . the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.'" Mr. Justice Douglas, dissenting in *United States* v. *International Union,* 352 U.S. 567, 596 (1957). Thus in the *Cantwell* case the Court struck down, as an abridgement of Cantwell's First Amendment rights, an ordinance restricting his conduct on a public street. Similarly, in *Hague* v.

C.I.O., 307 U.S. 496 (1939), while recognizing that streets and parks are held in trust for the use of the public and that conduct therein is subject to regulation, the Court held that municipal officers were properly enjoined from enforcing ordinances forbidding the distribution of printed matter or holding meetings in streets and parks without a permit. Again in *Schneider* v. *State*, 308 U.S. 147 (1939) the Court ruled "that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." 308 U.S. 162. See also *Lovell* v. *Griffin*, 303 U.S. 444 (1938). And in *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), the Court held that the use of the mails may not be conditioned upon a requirement that operates as a limitation on the unfettered exercise of First Amendment rights. Cf. *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).[10]

There are limitless and dangerous implications in the Commission's argument that since a broadcaster uses a public frequency under a license the Commission may "in the public interest" compel him to comply with the "personal attack" doctrine. The same argument would justify almost any interference by the Commission with programs concerning public affairs; the Commission would be restricted only by its own concept of what constitutes the "public interest"—at least, in the ab-

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[10] See Mr. Justice Harlan, dissenting in *Roth* v. *United States*, 354 U.S. 476, 504, Footnote 5, (1957) "The hoary dogma of *Ex parte Jackson*, 96 U.S. 727 and *Public Clearing House* v. *Coyne*, 194 U.S. 497, that the use of the mails is a privilege on which the government may impose such conditions as it chooses, has long since evaporated." [Citing cases]

sence of litigation. True, the Commission in its letter to the petitioners (A48, 49) stated that

> "* * * Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's 'honesty, character, integrity or like personal qualities.' * * *"

But such a personal attack stands on no different footing, and is entitled to no lesser protection under the First Amendment, than any other speech. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); cf. *Winters* v. *New York*, 333 U.S. 507, 510 (1948).[11] The Commission's attempt to justify its "personal attack" doctrine as a modest and reasonable intrusion upon First Amendment rights, applying only to certain "personal attacks", is a striking illustration of the danger of opening the door barring the abridgement of free speech.

In any event, the Commission has completely failed to demonstrate that there is any overriding or compelling public interest which requires the imposition of restraints or sanctions upon radio broadcasts of personal attacks. That the Commission believes such ac-

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[11] "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (333 U.S. 510) Cf. also Mr. Justice Douglas dissenting in *United States* v. *International Union*, 352 U.S. 567, 597, "First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy."

tion desirable and in the public interest is of course not conclusive. No doubt the legislatures or municipal authorities believed it was desirable and in the public interest to enact the statutes or regulations which this Court struck down in *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Talley* v. *California,* 362 U.S. 60 (1960); and *Mills* v. *Alabama,* 384 U.S. 214 (1966). This Court, however, was constrained to disagree.

In its letter to the petitioners (A49) and in the Court below the Commission relied upon language found in *National Broadcasting Company* v. *United States,* 319 U.S. 190, 226, 227 (1943). There, Mr. Justice Frankfurter wrote:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

Earlier in the same opinion Mr. Justice Frankfurter stated:

> "But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply." 319 U.S. 215, 216.

We submit, however, that these statements must be read in context. The Court in the *National Broadcast-*

ing Company case was considering the validity of the Commission's Chain Broadcasting Regulations. There was no question of any attempt to control the contents of programs or impose any previous condition or restraint upon broadcasts. We submit that Mr. Chafee's analysis of the matter is sound. Referring to Justice Frankfurter's statements, Chafee wrote:

> "Did Justice Frankfurter mean to say that the FCC could control the contents of programs, contrary to what Justice Roberts had said a few years before, as quoted above? Or did he have in mind the character of the persons participating in broadcasting and their methods of competition? The latter sense seems to me more probable and need cause no alarm." (Chafee, Government and Mass Communications, 1947, p. 580)

The statement by Mr. Justice Roberts, to which Mr. Chafee referred, appears in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940), where the Court, speaking through Mr. Justice Roberts, said:

> "But the Act [Communications Act of 1934] does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

It has been contended, and no doubt will be argued by the Commission here, that in some way the fact that the number of available broadcast frequencies is limited makes radio broadcasters subject to regulation curtailing the right of free speech that would not be permissible in the case of newspapers. Although the reasoning is somewhat obscure the argument seems to run that since frequencies are scarce broadcasting facilities must also be scarce, and this being so the Commission

may impose conditions and restraints upon broadcasters, to assure that their programs are "fair", "balanced", diversified, and in the public interest. In the absence of such regulation, it is said, there might not be diversity in the voices heard on the air, and the public might not hear both sides of controversial issues.

The petitioners submit that restrictions on freedom of speech in radio cannot be sustained, whether the number of radio stations be large or small. The First Amendment rights of broadcasters do not wax or wane according to the number of stations on the air.[12] Assuming that the premise of the Commission's argument is accepted would the Commission then have *carte blanche* to control the contents of broadcasts if there were only one radio station, or a dozen, or a hundred? We think not. In any event the Commission's argument is not supported by the facts. There are 6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1.[13] Given these thousands of outlets for the expression of opinion over the air, it flies in the face of reality to contend that diversity must be enforced by governmental regulation of the type applied to the petitioners. It would indeed be more logical to argue that since the number of daily newspapers is comparatively small and is steadily diminishing the government should take a hand to assure that all spectrums of opinion are represented in the press.

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[12] Cf. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449; op. cit. supra, note 4.

[13] U.S. Bureau of the Census Statistical Abstract of the United States, 1967 (88th Ed.), Nos. 737, 746.

The Commission's rules and regulations prohibit common ownership or control of more than seven AM, FM and TV stations. *FCC Rules & Regulations*, Secs. 73.35(b), 73.240(a)(2), 73.636(a)(2).

In comparing the situation of radio broadcasting with that of newspapers another factor must be considered. The time available for use by a broadcasting station is limited; if a broadcaster is ordered to carry a particular program he obviously cannot add another fifteen minutes to his broadcasting day, but must make a place for the program by re-arranging his schedule and omitting other material. A newspaper, however, is under no such limitation, but may add columns or pages without difficulty. Yet it will hardly be suggested that because newspapers are comparatively few in number and can without difficulty in terms of space carry responses to personal attacks they may in the public interest be required to publish such a response whenever a personal attack is printed.

It was argued by the Commission in the court below, and held by that court, that the Commission's order to the petitioners was justified by Section 315(a) of the Communications Act of 1934 (47 USC 315(a)) as amended in 1959. (*Supra*, p. 3) The theory of the Commission was that by the amendment of Section 315(a) Congress approved the Commission's "fairness doctrine" and specifically approved the application of that doctrine in the "personal attack" ruling directed against the petitioners. It was also suggested, and the court apparently agreed, (A 128; 381 F. 2d 928) that the "personal attack" rule was authorized by 47 USC 303(g) (*supra*, p. 2), empowering the Commission to "generally encourage the larger and more effective use of radio in the public interest."

We submit that these arguments are unsound. First, as we believe we have demonstrated, if Section 315(a) as amended, or any other statutory provision upon which the Commission may rely, has the effect con-

tended for by the Commission it is to that extent unconstitutional. In the second place, the history of the 1959 amendment to Section 315(a) clearly discloses that it did not authorize and was not intended to authorize the Commission's personal attack doctrine. As we have said, the purpose of the amendment was to overturn the ruling of the Commission in the so-called *Lar Daly* case,[14] that a television station which used a brief news clip of a candidate's activities—without the candidate's prior knowledge or consent—was required to provide equivalent free time to all opposing candidates to use the station as they saw fit. The report on the amendatory legislation by the Senate Committee on Interstate and Foreign Commerce made it plain that the purpose of Congress was to prevent the "blackout in the presentation of legally qualified candidates" that would inevitably result from any such free time requirement. Senate Report No. 562, July 22, 1959, to accompany S2424. There is nothing whatever in the report or in the history of the bill to suggest that while amending the law to prevent one type of blackout by a free time requirement Congress intended to authorize another. Furthermore, the Commission's personal attack doctrine was not articulated until 1962—three years after Congress amended Section 315(a). *Clayton W. Mapoles,* 23 Pike & Fischer, RR 586 (1962); Fairness Primer 29 Fed. Reg. 10415 (1964). The Commission's suggestion that in 1959 Congress was fully aware of the personal attack doctrine is therefore untenable. In this connection it should be noted that in Conference Report No. 1069 on the proposed amendment the managers on behalf of the House stated that the provision of the bill imposing an obligation of fairness

[14] 26 FCC 715.

upon broadcasters was merely "a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." In short, the amendatory legislation conferred no new authority upon the Commission.

CONCLUSION

In conclusion, it is submitted that the order of the Federal Communications Commission directing the petitioners to notify Mr. Cook of the personal attack upon him broadcast over the petitioners' station, to furnish him with a transcript, recording or summary of the broadcast and to grant him free time to respond, is an abridgement of the freedom of speech and of the press guaranteed by the First Amendment. We submit that the Court should enter a judgment holding the order invalid and relieving the petitioners of the obligation to comply.

Respectfully submitted,

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Board of National Missions of the United Presbyterian Church in the U.S.A.,
National Division of the Methodist Board of Missions,
General Board of Christian Social Concerns of the Methodist Church,
The National Council of Churches—Broadcasting and Film Commission,
National Catholic Conference for Interracial Justice,
National Board of the Young Women's Christian Association of the U.S.A.,
The American Jewish Committee,
National Citizens Committee for Broadcasting, and
American Federation of Labor-Congress of Industrial Organizations, *Amici Curiae*

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INDEX

	PAGE
Preliminary	2
Background	2
Changes in the Broadcast Industry	6
Increase in Channels	6
Network Dominance of Programming	9
Compliance With the Fairness Doctrine	11
The "Fourth Network"	13
Summary of Views	19
ARGUMENT:	
POINT I—The First Amendment to the Constitution not only permits but requires that the Commission act so as to assure fair use of the public airways	20
The Metropolitan Newspaper Analogy	28
POINT II—License renewal proceedings have not proved effective in obtaining compliance with the Fairness Doctrine; the public interest requires a direct and summary procedure	31
POINT III—The Personal Attack and Political Editorial Rules are a modest first step toward balanced programming on controversial issues	34
The Rules do not impose an undue financial burden	36
Conclusion	39

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PAGE

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PAGE

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PAGE

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PAGE

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PAGE

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Nos. 2 and 717

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National Board of the Young Women's Christian Association of the U.S.A.
The American Jewish Committee,
National Citizens Committee for Broadcasting, and
American Federation of Labor-Congress of Industrial Organizations, *Amici Curiae*

Preliminary

This brief as *amici curiae* is submitted, with the consent of the parties, by the organizations listed on the cover. They may be described as:

(a) National instrumentalities of Protestant and Greek Orthodox churches concerned with broadcasting and with service to racial minorities and the underprivileged;

(b) National organizations of persons of the Christian and Jewish faiths concerned with social service and the protection of racial and religious minorities;

(c) A non-profit educational corporation concerned with better broadcasting; and

(d) A non-profit organization concerned with protection of the rights and interests of labor.

These organizations have experience in broadcasting and with its effects both as producers of programming on religious and social issues and as participants in social action in all parts of the United States.

Background

The concept of fairness is as old as our system of broadcasting.[1] From the earliest days of radio, broadcast licenses were reserved for those who proposed to serve the broad range of community interests and were denied to those who used their facilities for purely personal expres-

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[1] For an historical review of broadcast fairness, see U. S. Senate Committee on Commerce, Subcommittee on Communications, *Fairness Doctrine* (Staff Report prepared by Robert Lowe), 90th Cong., 2nd Sess., 1968. See also Leon Seymour Stein, "Editorializing by Broadcast Licensees" (Unpublished Ph.D. Dissertation, New York University, 1965).

sion. As early as 1929, in its *Great Lakes* brief,[2] the Federal Radio Commission stated:

> "Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. Insofar as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public."

As early as 1931, the Commission indicated that use of a public channel to make unfounded personal attacks was not consistent with good broadcast service:

> "The Commission holds no brief for any parties subjected to attacks through the medium of Station KGEF, but in almost every instance appearing in the record the attacks made by Shuler, and the methods employed therefore, are certainly not in the interests of the public or the rendition of a commendable broadcasting service. The broadcasts of this party are filled with misstatements of fact and insinuations based thereon. . . . Surely, the use, in such a manner, of one of the most powerful mediums of furnishing instruction and entertainment to the public does not meet the statutory standard upon which the right to hold a license must be based. While the Commission does not have the power of censorship, it does have the duty of determining whether the standard fixed by law has been or will be met by the use of a broadcast license. Broadcasting facilities are limited. . . . For each license held and used in a manner such as that of the applicant, there is a potential licensee who is able,

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[2] *Great Lakes Broadcasting Co.* v. *Federal Radio Commission*, 37 F. 2d 993 (D. C. Cir. 1930), reversed the Commission but indicated approval of its findings as to programming.

ready and willing to conduct his station in such a manner as to furnish a good broadcasting service.'"[3]

The rule of "fairness" was refined and clarified in a number of cases over the next two decades. Consistent with the concept that the channels were to provide expression for the public and not for the station owners, it was held that "the broadcaster cannot be an advocate", which was taken to mean that he should not editorialize.[4]

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[3] FRC, Docket 1043, *Trinity Methodist Church, South,* KGEF (1931); affirmed, *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. 2d 850 (D. C. Cir., 1932).

[4] See *Mayflower Broadcasting Corporation,* 8 F.C.C. 333 (1941). The full rationale was:

> "Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.
>
> "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." (pp. 339-40)

The "muzzling" of the station owners was strongly protested and was reconsidered at length in the *Mayflower* hearings.[5] Finally, in 1949, the rule was revised and set forth in a comprehensive statement of Commission policy, the "1949 Editorializing Report."[6] This statement reversed the previous policy against editorializing by broadcast licensees, but coupled the right to editorialize with the duty to present alternative views. Since 1949, this policy has been known as the "Fairness Doctrine".

Similarly, stations were permitted to make personal attacks, but they were cautioned that:

> ". . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist".[7]

This duty to invite reply has become known as the "personal attack principle" of the Fairness Doctrine.

In reporting the Equal-Time Amendment to the Communications Act in 1959, the Senate Committee took great care to indicate its intent that the Fairness Doctrine should remain in effect:

> "In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of public affairs and matters of public controversy." (S. Rept. 562, 86th Cong., 1st Sess., p. 13.)

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[5] Representatives of some of the organizations submitting this brief participated in the *Mayflower* hearings in support of the rule of fairness.

[6] *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 25 P & F Radio Reg. 1901 (1949).

[7] 13 F.C.C. 1246, at p. 1252.

To make this point even clearer, a proviso was written into Section 315 as follows:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, * * * from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The Conference Committee of the House and Senate described this as "a restatment of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communication Act of 1934" (H. R. Rept. No. 1069, 86th Cong., 1st Sess., 1959).

The 1949 Editorializing Report has remained Commission policy without substantial change.[8] Until recently it has been accepted by the industry without much objection and with no legal challenges. However, the personal attack rule has been reiterated and made more specific because of continued violations by some stations.[9]

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[8] Chairman Henry testified in July, 1963 that the Editorializing Report "still represents the Commission's basic policy in this important area". *Hearings on Editorializing Practices* before a Subcommittee of the House Committee on Interstate and Foreign Commerce 88th Cong., 1st Sess., 1963, p. 84. The *Editorializing Report* was republished as an attachment to the *Fairness Primer* on July 1st, 1964, 29 Fed. Reg. 10415. Apparently the *Public Notice of July 26, 1963*, 28 Fed. Reg. 7962, and the *Fairness Primer* were a response to criticism in the 1963 Congressional hearings that the Commission had not done enough to publicize the Fairness Doctrine.

[9] The *Public Notice of July 26, 1963*, 28 Fed. Reg. 7962 included the statement that

> "Several recent incidents suggest the desirability of calling the attention of broadcast licensees to the necessity for observance of the fairness doctrine stated by the Commission in its opinion of June 1, 1949 in Docket No. 8516."

When it adopted the rule now being attacked, the Commission noted that despite the July 26, 1963 Public Notice and the 1964 Fairness Primer and the Commission's rulings on the question,

> "* * * the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

Changes in the Broadcast Industry

Increase in Channels

There have been dramatic changes in the broadcasting industry since 1949, including a considerable increase in the number of television stations and AM and FM radio stations.[10]

It has been suggested that the increase in the number of stations has resulted in such a diversity of program sources that the Fairness Doctrine is no longer necessary. However, despite the increase in stations, almost 2,000 communities in the United States have only one radio station licensed to serve them and 289 communities have only one licensed television station;[11] of course, many communities have none.

One of the requirements of a broadcast license is that the licensee provide public service to the community to which it is licensed, which should include local news coverage, public service announcements and reasonable opportunity for discussion of controversial issues of public importance in the service area. *Network Programming In-*

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[10] The number of on-air commercial television stations has increased from 69 to 626; educational television stations from 0 to 127; commercial AM stations from 2,006 to 4,135; commercial FM stations from 737 to 1,706 and educational FM stations from 34 to 318. *33rd Annual Report,* Federal Communications Commission, Fiscal Year 1967. U. S. Government Printing Office 1968.

[11] An analyses of radio station listings reveals that there are 1,279 communities with a single AM station, 173 with a single FM station and 278 with AM and FM stations operating under the same call letters. (An undetermined number of single AM-FM combinations program separately and operate under different call signs but have interlocking ownership.) *Broadcasting Yearbook 1968* (Washington, D. C. Broadcast Publications, 1967). In general, independent FM stations are financially weak and cannot produce much original programming. Of 405 such stations, only 115 reported a profit for 1967. Out of 1,482 AM and AM/FM stations in one-station communities, 417 reported a loss for 1967. In two station communities, 176 out of 513 reported a loss. *Broadcasting,* Feb. 10, 1969, p. 50.

quiry, Report and Statement of Policy, July 29, 1960, F.C.C. 60-970. Although residents of a small community may receive signals from a number of AM stations, only the station licensed to such community is likely to cover local issues. The same is true of television and FM radio stations which are fewer in number and have smaller service areas.

Many of the AM stations broadcast only during daytime hours. Many of them are so-called "rip and read" operations which select their news reports from a wire service and present little or no public affairs programming (see footnote 22, below).

Similarly, there is little diversity in the coverage of local news and issues on television stations, particularly in small communities. The economics of the industry is such that profitable operation is difficult without a network affiliation.[12] The networks, however, have a policy of granting affiliation only to stations in large communities and of protecting them from competition with stations in or near their service areas.[13] Independent stations find it difficult to operate profitably even in major markets[14] and there are relatively few of them.[15] Furthermore, networks give a preference in granting affiliation to owners of AM affiliates and multiple owners[16] which tends to limit the competitive effect of new stations.

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[12] See *Network Broadcasting,* H. Rept. 1297, 85 Cong. 2d Sess., pp. 195-198.

[13] *Ibid.,* pp. 216-17, 226-236.

[14] *Ibid.,* p. 197, Table 14.

[15] It was hoped that UHF stations could serve many areas outside major markets. However, the networks have refused to grant affiliations to UHF stations or have allowed them only programs which are unacceptable to VHF affiliates (*Ibid.,* pp. 220-226). This refusal of affiliation occurs even where viewers are in the grade B contour area of the VHF station or receive it by cable systems available only on a limited basis and at considerable cost.

[16] *Ibid.,* pp. 236-246.

Network Dominance of Programming

The increase in the number of television stations has been accompanied by a trend toward increased network control over the production of programming. This trend was disclosed by the Federal Communications Commission's Program Inquiry (Docket No. 12782) begun in February, 1959. The Commission found evidence that:

> ". . . network corporations, with the acquiescence of their affiliates, have adopted and pursued practices in television procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programming."[17]

The Report revealed that the percentage of independently-provided programs in network prime-time schedules declined from 32.8% in 1957 to 6.9% in 1964.[18] Moreover, in accordance with established policies, networks produce and own virtually all news and public affairs programs included in network schedules.[19]

There has also been a substantial increase in network participation in the syndication of programs, which increasingly consist of "off-network" programs. According to the Commission, "The first run syndication market appears to have virtually disappeared."[20]

The Commission has been considering since 1965 adoption of a rule to restrict network control of programming, in-

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[17] *Television Network Programming*, F.C.C. 65-227, 4 P & F Radio Reg. 2d, pp. 1589, 1591. See also *House Report No. 281*, 88th Cong. 1st Sess., May 8, 1963.

[18] *Ibid.*, p. 1600.

[19] *Ibid.*, p. 1599.

[20] *Ibid.*, p. 1606.

cluding a provision that 50% of the prime time schedule must consist of independent programs.[21] However, it appears clear that networks will continue to own and produce substantially all network-originated news and public affairs programs to maintain the policy of attempting to insulate such programs from the influence of sponsors and their advertising agencies. There is little local public-affairs programming on network affiliates and almost none in prime-time hours when the largest audience is available.[22]

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[21] *Ibid.*, See also P & F Radio Reg. Current Service, p. 53:601, 608n.

[22] A recent analysis of renewal applications of Oklahoma broadcast licensees by F.C.C. Commissioners Cox and Johnson concluded:

> "Of the 10 commercial television stations which submitted renewal applications in the instant proceeding (which take in a total of more than $16 million in gross revenues annually), only one station devotes as much as 2 hours a week to programs which can be classified as 'local public affairs' (out of 105 to 134 hours per week of programming). Two stations devote between 1 and 2 hours to local public affairs. Six stations carry less than 1 hour. Two stations carry none at all.
>
> "Three of the TV stations carry less than 8 hours of news per week.
>
> "There is not in the entire State a single regularly scheduled prime time program devoted to presentation, analysis, or discussion of controversial issues of public importance in the State or in the community.
>
> "There is not in the State a single station which carries as much as 1 hour per week of locally originated programming in the prime viewing hours, other than news, weather, and sports.
>
> "Radio, although a fairly significant source of news, and not infrequently of local news, provides almost literally no public affairs service at all other than news. With but a handful of exceptions, Oklahoma radio stations do not offer even a token effort to serve as a forum for discussion of local issues of public importance. *Broadcasting in America and the F.C.C.'s License Renewal Process: An Oklahoma Case Study*, 14 F.C.C. 2d 1, 12-13.
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> * * *
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> "In 1962 and 1963, the Federal Communications Commission held hearings on local television programming in Chicago and Omaha. It was found that even in the large cities, TV stations originated relatively little programming of their own, and that what local programming they did put on consisted mostly of news, weather, and sports'." (14 F.C.C. 2d at p. 8)

Documentaries and discussion programs on controversial issues are increasingly selected by a handful of television network executives, and rarely relate to local issues.[23] Thus the increasing reliance of the public on television programs for news and opinion and the decline in the number of metropolitan daily newspapers have not produced diversity but have resulted in a centralization of control over communication on public questions which is entirely without precedent in American history.[24]

Compliance With the Fairness Doctrine

With rare exceptions, the broadcast networks have complied with the Fairness Doctrine. Partly, this is because the networks provide programming for the widest possible national audience, including a broad spectrum of economic, racial, political and geographic interests. They therefore tend to avoid programming which is controversial enough to irritate any substantial group. Network documentaries

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[23] According to the former head of CBS News, he had to fight a continual battle with President Frank Stanton over coverage of the Vietnam war because of Stanton's "concern that too much 'dove-hawk' talk unsteadied the hand of the Commander in Chief". *Due to Circumstances Beyond Our Control,* Friendly, Fred W., Random House, New York, 1967 page 267. This dispute culminated in Friendly's resignation after the presentation of a fifth rerun of "I Love Lucy" instead of Senate Committee hearings on Vietnam (*ibid.*, p. 239). According to Friendly, decisions on equal time demands are not made by CBS network news directors, but by senior network executives and reflect political considerations. *Ibid.*, pp. 82-83, 91-92.

[24] According to *Broadcasting,* Dec. 16, 1968, p. 30, the *Report of the President's Task Force on Communications Policy* emphasizes that Federal regulatory policy has failed to diversify television output.

on controversial issues reached a peak in 1963, following the quiz scandals, but have declined since.[25]

Fairness Doctrine complaints against networks are extremely rare. An analysis of complaints filed with the F.C.C. during the period from July 1, 1965 to June 30, 1966 indicated that almost all the complaints were against local programming.[26]

Out of 14 program types against which complaints were made, the three network program types ranked 12th, 13th and 14th:

	% of Total Complaints
Network documentary	1.125%
Network news	0.875%
Network panel or discussion	0.875%

The most complained against program types were:

Syndicated program series	21.25%
Open mike	19.25%
Editorials	11.625%
Local News	10.25%

Out of 800 complaints, only 173 involved personal attacks and none of these was a complaint against a network.[27]

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[25] William S. Paley, CBS Board Chairman, is quoted as telling Edward R. Murrow, when Murrow's "See It Now" was discontinued, "I don't want this constant stomach ache every time you do a controversial subject". Friendly, *op. cit.*, p. 92.

Newton Minow said the networks "want provocative programs that don't provoke anybody" and the advertising agencies "want a strong, hard-hitting, non-controversial show that won't offend anybody—and above all no gloom." Minow, Newton, *"Equal Time"* Atheneum, 1964, p. 92. See also the chapter "Documentaries and Special Events" in McNeill, Robert, *The People Machine*, Harper & Row, New York, 1968, pp. 75-91.

[26] *Fairness Doctrine, supra*, pp. 64-74.

[27] *Ibid.*, p. 68, Table III. There were no political editorial complaints against networks because all networks have a policy against editorials of any kind.

To the best of our knowledge, all reported cases involving Fairness Doctrine complaints (including personal attacks) were against local stations, none of which was in a major market.[28] Except for the *Red Lion* case all have involved complaints of racist programming and personal attacks.

The "Fourth Network"[29]

It is no accident that Fairness Doctrine complaints are primarily against stations in small communities. Such stations are often marginally profitable and sell time at low rates. Large amounts of local radio and television time are purchased by distributors of syndicated programs. Programs are recorded on tape and "bicycled" from one

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[28] *Office of Communication* v. *F.C.C.*, 359 F. 2d 994 (D. C. Cir. 1966), reversing, *In re Lamar Life Broadcasting Co.*, 1 F.C.C. 2d 1484, 5 P & F Radio Reg. 2d 205, on rehearing 14 F.C.C. 2d 431, 13 P & F Radio Reg. 2d 769 (1968). *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 381 F. 2d 908 (D. C. Cir. 1967), *Anti-Defamation League* v. *F.C.C.*, 14 P & F Radio Reg. 2d 2051, affirming *Station KTYM*, 7 P & F Radio Reg. 2d 595 (1968); *In re Brandywine-Main Line Radio Inc.* (WXUR), 14 P & F Radio Reg. 2d 1051 (1968). Two other important cases have considered the constitutionality of the Fairness Doctrine more abstractly, i.e. the *Radio Television News Directors* case now before this Court and *Banzhaf* v. *Federal Communications Commission*, 14 RR 2d 2061 (1968). Of these, the *Banzhaf* case was initiated by a complaint against a television station (WCBS) in New York City and was based upon specific cigarette commercials. However, the Commission's ruling embraced all cigarette commercials. *The Radio Television News Directors* case does not involve any complaint against anyone.

[29] ". . . large parts of the U. S. are awash in a diet of far-right broadcasting. Urban listeners seldom hear the broadcasts or, if they do, quickly tune out. But in those areas known in the broadcast trade as 'the boondocks,' the sounds of the far right are, in effect, a fourth network." (*Newsweek*, July 4, 1966, p. 79)

station to another. Typically, the time is sold by the commercial department and the programming is neither previewed nor monitored.

The majority of these syndicated programs are sponsored by so-called "non-profit" organizations established by affluent persons. They are used for the broadcasting of the sponsor's political and social views. Typically, these programs contain a heavy diet of diatribe and abuse. The most frequent subjects for attack are Negroes, Jews, Catholics, indigents, foreigners, and holders of "left-wing" views. A common philosophy of such programming is that the groups under attack have infiltrated and subverted the traditional institutions of American life and are destroying America.

According to Jack Gould of the New York Times:

> "As any random sampler of radio stations can readily attest, the airwaves are literally burdened by thousands of programs, often bankrolled by individuals of substantial means and extremely conservative outlook, which have little to do with journalistic values. Radio stations, eager for additional revenue, accept the perorations of these spokesmen almost blindly. The news departments of such stations frequently are not even involved; the matter is regarded as a straight sale of time."[30]

In 1964, "The Hate Clubs of the Air [were] spewing out a minimum of 6,600 broadcasts a week, carried by more than 1,300 radio and television stations—nearly one out of every five in the nation." *Radio Right—Hate Clubs of the Air,* Fred J. Cook, *The Nation,* May 25, 1964, page 523.

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[30] New York Times, January 14, 1967.

By 1967, according to *TV Guide*, ". . . the strident voices of the so-called Radical Right . . . are now heard on more than 10,000 radio and television broadcasts each week in 50 states". *They Call Themselves Patriots,* Neil Hickey, *TV Guide,* April 15, 1967, page 14. A survey recently completed by the Office of Communication indicates that "call-in" radio programs are also widely used by right-wing sponsors and commentators, especially in the Mountain States, to promote extremist views and oppose liberal legislators. (See "Cleaning up the 'Call-in' ", Shayon, Robert Lewis, *Saturday Review,* Feb. 24, 1968, p. 56.

Examples of the programming of such stations appear in the initial decision on the renewal application of station WXUR. The intervenors in that case monitored and transcribed about 65 alleged personal attacks in one week and supplemented this list with many others. These attacks occurred on local programs and on a number of syndicated programs, including the "Twentieth Century Reformation Hour," "Life Line," "Manion Forum" "Behind the Headlines," "Commentary," "Independent American," "The Dan Smoot Report," "Church League of America," "Christian Crusade," and later, Richard Cotten's "Conservative Viewpoint".[31]

Although not all of the critical remarks could be classified as "personal attacks" within the meaning of the Commission rule, some examples may indicate their flavor:

> Senator Clark's "henchmen" were charged with threatening to put someone to sleep; the American Civil Liberties Union was described as "a Communist

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[31] "Christian Crusade" gave rise to the personal attack in the *Red Lion* case. "Conservative Viewpoint" included the personal attack in the *KTYM* case.

> front or transmission belt organization"; Dr. Franklin Littell was called "the left-wing President of the gestapo-like Institute for American Democracy" and he was referred to as "plainly and disgustingly sarcastic, rude, discourteous, insolent, arrogant, bigoted and intolerant". Dore Schary was described as having "a public record of affiliation with Communist fronts," the Methodist Board of Social Concerns was described as "active in the Methodist Federation for Social Action (a cited Communist front)."

There were no invitations to answer any of these comments.[32]

In a license renewal application involving television station WLBT in Jackson, Mississippi,[33] the Hearing Examiner refused even to hear evidence on the following matters, among others:

> A so-called "Freedom Book Store", carrying segregationist publications, was operated on the station premises. The station telecast several thousand free announcements for this book store during the renewal period, with no announcements for any group holding opposing views.

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[32] The Hearing Examiner held that "only for the most flagrant of violations should WXUR be denied its renewal of license". He found that on balance, WXUR "performed what would normally be considered a wholesome service in providing an outlet for contrasting viewpoints on a wide variety of subjects" and that the renewal application should be granted. *In Re Brandywine-Main Line Radio Inc.*, 14 P & F Radio Reg. 2d 1541.

[33] *Office of Communication* v. *F.C.C.*, 359 F. 2d 994 (D. C. Cir. 1966), on rehearing, *In re Lamar Life Broadcasting Co.*, 14 F.C.C. 2d 431, P & F Radio Reg. 2d 769 (1968).

Local public affairs programming consisted almost entirely of right-wing programs, including the Citizens' Council Forum, the Dan Smoot Report, Life Line, Freedom University of the Air, the Christian Anti-Communist Crusade, and the programs of Patriotic American Youth, the John Birch Society, and Women for Constitutional Government.

Paid spot announcements of the Citizens' Council were broadcast without reply, including the following statements, among others:

"You're seeing published proof that the Communists are directing the integration drive in Mississippi. . . ."

"The headlines tell the story . . . the Communists are leading the fight to integrate Mississippi".

"Recent news reports show how the Communists are trying to raise the race question in Mississippi!"

There was an alleged false news report that federal officers were coming to arrest the Governor. This was part of a Citizens Council stratagem to surround the Governor's Mansion with an armed mob so that he would not give in to a court order.

Evidence also showed that inflammatory editorials were broadcast calling upon television viewers to resist court orders directing the integration of the University of Mississippi. These editorials were followed by riots and loss of life.

Along with this unbalanced programming were violations of the personal attack principle. For example, a seven-program series called "Meet the Candidates" included a repeated question about the situation at Tougaloo College, which was then the only accredited college in Mississippi open to Negroes. Responses such as the following

were elicited:

> "One word describes it—horrible. We are nursing the viper to our breast. One man has said that there is not a Communist in the whole State of Mississippi and they are teeming up there at Tougaloo. They are working full force, day and night, and some of the most solid citizens sit back and say, 'Oh, no, we don't have any Communist', and then add insult to injury, anyone who disputes them is called a witch hunter and a wild eyed saboteur, and other such words."

It was not denied that when the President of Tougaloo College called the station manager to protest, and asked for a transcript, he was falsely informed that the station had no record of the program.

Syndicated programs presenting different views are available from such organizations as the United Nations, the National Council of Churches, the AFL-CIO and others. However, these organizations do not ordinarily purchase time from the stations and their programs have little circulation in the "Fourth Network".

Stations which carry the "hate clubs" attract audiences of like-minded listeners, who tend to take over the "open mike" shows and to control the choice of local announcers and commentators. Such stations become instruments of communication for only one segment of local opinion. If such stations were used only for attacks on national institutions, they would be relatively harmless but they take an active role in the discussion of local issues, such as school board elections, educational budgets, welfare policy, and selective service procedures. Since such stations are often the only stations licensed to their communities, they can create an atmosphere in local communities like the "McCarthy Era" in Washington.

The size and influence of the "Fourth Network" should not be underestimated. The leading program series, Rev-

erend MacIntire's "Twentieth Century Reformation Hour" is broadcast daily by about 635 stations,[34] and many similar program series are broadcast on hundreds of stations.

Summary of Views

The various broadcast parties argued below that the Fairness Doctrine, including the personal attack principle, inhibits free and vigorous debate. There was no substantial evidence submitted to the Commission in its rule-making proceedings that the Doctrine had this effect. The organizations submitting this brief believe that the most important part of the Fairness Doctrine is its emphasis on the affirmative duty of a licensee to cover controversial issues of public importance. Unless this duty is enforced by law, the great potential of broadcasting as an instrument for free expression of ideas will never be exploited. Left to their own preferences, the broadcast networks and most licensees would present a negligible amount of public affairs programming and such programming would be even more bland and innocuous than present programming. Since broadcasting has tended to supplant print media, the end effect of "freedom for broadcasters" would be less debate than we now have, and less than we knew before broadcasting began.

The Doctrine's requirement that all sides be presented is rarely invoked against networks, but in view of broadcasting's limited diversity of program sources, it is very necessary. Even if there were no Fairness Doctrine, the networks would have to follow a policy of fairness because the public and Congress would not tolerate one-sided programming from organizations having the unprecedented

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[34] *TV Guide*, April 15, 1967, p. 15. This circulation should be compared with the number of stations affiliated with each of the networks: NBC television—201, NBC radio—221, CBS television—192, CBS radio—244, ABC television—153, ABC radio (four sub-networks)—900, Mutual radio—500. Source: *Broadcasting Yearbook 1969*, pp. E6-E16.

concentration of power over public affairs programming which the three networks have today.[35]

The personal attack principle and the Personal Attack and Political Editorial Rule have virtually no application to network programming since networks never editorialize and almost never present personal attacks as that term is defined in the rule. However, the principle and Rule, if enforced, could serve as a means of access to local broadcast media for members of minority groups, and holders of minority views. Controversial ideas are heard in broadcasting today principally on small stations in rural areas where there is little or no diversity of media. For the most part, what they present is not robust debate but one-sided abuse, and unanswered it has little social utility. The organizations sponsoring this brief believe that the personal attack principle does not curtail discussion, but provides a means by which all points of view can get a hearing.

ARGUMENT

POINT I

The First Amendment to the Constitution not only permits but requires that the Commission act so as to assure fair use of the public airways.

Even prior to the Radio Act of 1927, it was recognized that the scarcity of radio channels required that they be used only for worthwhile programming and that among the important uses were instruction and discussion of

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[35] Very often the Fairness Doctrine is twisted and distorted by broadcasters to create an excuse for avoiding programs which might irritate powerful groups. McNeill, *op. cit.*, pp. 268-271. As McNeill, an experienced ex-broadcaster put it, "Viewed positively, the Doctrine can be regarded as a stimulus to a bolder editorial policy and a protection against outside pressures. Revoking it, as many broadcasters advocate, would be unlikely to result in more forthright expressions of editorial opinion". *Ibid.* p. 281. "Kicking the Fairness Doctrine will not strengthen TV news coverage. Fairness is about the only quality in broadcast journalism which makes it editorially superior to print". *Ibid.* p. 291.

social problems. In 1924, Secretary of Commerce Herbert Hoover stated that,

> "the value of this great system does not lie primarily in its efficiency. Its worth depends on the use that is made of it. It is not the ability to transmit, but the character of what is transmitted that really counts . . . For the first time in history we have available to us the ability to communicate simultaneously with millions of our fellowmen, to furnish entertainment, instruction, widening of vision of national problems and national events. An obligation rests upon us to see that it is devoted to real service and to develop material that is transmitted into that which is really worthwhile . . ."[36]

During this early period, radio stations were multiplying rapidly under licenses granted by the Secretary of Commerce. Between March and November of 1922, the number increased from 60 to 564 with the Secretary attempting to review program proposals and to assign frequencies in such manner as to protect the public interest. In April, 1926, it was held that the Secretary had no discretion to refuse radio station licenses under proper applications.[37] The result was a race for channels which continued until the enactment of the Radio Act of 1927. This Act created the Federal Radio Commission and made it clear that the Commission need not grant a license unless it is satisfied that "the public interest, convenience and necessity" would be served thereby. This phrase was universally understood to include the right to consider proposed program content and to review past programming. Thus, the 1929 Report of the Standing Committee on Radio Law of the American Bar Association argued in substance that "the

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[36] *Third National Radio Conference,* U. S. Department of Commerce Recommendations for Regulation (Washington: Government Printing Office, 1924), pp. 2-3.

[37] *U. S.* v. *Zenith Radio Corp. et al.*, 12 F. 2d 614 (N. D. Ill. 1926); Opinion of Acting Atty. Genl. Donovan, July 28, 1926, 35 *Op. Atty. Gen.* 126.

number of persons who may simultaneously engage in radio communication is rigidly limited by physical laws. Therefore, the licensing authority must have the power to determine the proportion of the radio spectrum assigned to any given type of service, to review its use by less worthy services, and to alter or replace the less worthy existing services with more worthy services."[38]

Among the first actions of the new Commission was its General Order No. 32, addressed to 164 stations, which stated that it was "not satisfied that public interest, convenience or necessity" would be served by granting their applications for renewal. And in its first review of the new "public interest" criterion for licensing, this Court stated that "the requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ."[39]

Again in *National Broadcasting Co.* v. *United States* the Court stated:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.[40]

Thus it has always been thought that the licenses to owners of broadcast stations could be conditioned on good

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[38] Paraphrased in Stein, *op. cit.*, p. 59.

[39] *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 285 (1933).

[40] 319 U. S. 190, 216 (1943). See also Note, "Governmental Regulation of the Program Content of Television Broadcasting," 19 G.W.L. Rev. 312, 317 (1950) and Note, "Regulation of Program Content by the FCC," 77 Harv. L. Rev. 701 (1964) and numerous cases cited therein.

The scarcity of channels has increased since the NBC decision,

(Footnote continued on following page)

service, and that in this sense, broadcasters were unlike publishers in print, who could be as good or bad as they liked. The extent to which a station has been made available for coverage of public issues has always been one measure of the quality of broadcast service.

In selecting among license applicants, the Commission considers not merely the program plans, but the character and financial responsibility of the applicants. These criteria, when taken with the criteria used by networks in granting affiliation and by advertisers in purchasing time, tend to limit licenses to persons of financial standing and established records of commercial success. If there were no element of scarcity, the licensing of important media for speech exclusively to such persons would surely violate the First Amendment. And given the practical necessity of this system, surely the free speech rights of those deprived of licenses must be protected to the maximum extent practicable.

The licensing of instrumentalities of speech and public assembly has many times been held to be irreconcilable with the First Amendment. See, for example, *Lovell* v. *Griffin,* 303 U. S. 444 (1937); *Jones* v. *Opelika,* 316 U. S. 584, 600 (1942), dissents adopted by the Court in 319 U. S. 103.

(*footnote continued from previous page*)

and this led former Commission Chairman Newton Minow, to write as recently as 1964:

> "A television channel is America's most scarce natural resource. As many as a dozen applicants plead for the privilege of using one channel. And because television channels are so scarce, because they can be used by such a small percentage of those who would like to have channels entrusted to them, their allocation and the supervision of their use rests with the federal government. Thus the government, not by choice but by absolute necessity, is ultimately responsible for the effect this medium has on the public." Minow, Newton, *Equal Time,* Atheneum, 1964, p. viii.

Where licensing is necessary, the licensee must make the facilities available to all views. *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (SDNY 1967) (Anti-Vietnam War subway posters). Public facilities cannot be made available to some and not to all. *Brown* v. *State of Louisiana,* 383 U. S. 131, 143 (1966); *East Meadow Community Concerts Association* v. *The Board of Education,* 18 N. Y. 2d 129, 219 N. E. 2d 172 (1966), after remand, 19 N. Y. 2d 605, 224 N. E. 2d 888 (1967).

In effect, the government has delegated the power to control access to the public channels to a limited group of private censors.[41] In controlling use of the channels to preserve program quality and to prevent interference, the government must regulate these private censors to assure that they grant access to all views, even if sustaining time is necessary.

The idea that a financial burden may be imposed upon the exercise of First Amendment rights has been rejected by this Court. *Jones* v. *Opelika, supra;* Cf. *Follet* v. *McCormick,* 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

In *Follet* v. *McCormick,* the Court reiterated that:

> "the exaction of a tax as a condition to the exercise of the great liberty guaranteed by the First Amendment is as obnoxious * * * as the imposition of censorship or a previous restraint." (p. 577)

As the Court pointed out in that case (which involved the sale of religious literature) "freedom of religion is not merely reserved for those with a long purse."

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[41] In addressing the National Association of Broadcasters, Commissioner Robert E. Lee recently stated a "station proceeds at its peril if it does not know what is coming down the line. The job of the station is to censor and if it is doing its job, it censors every day." *Broadcasting,* Oct. 28, 1968, p. 63.

In the case of *Marsh* v. *Alabama,* 326 U. S. 501 (1946), this Court made it clear that private ownership or control over property usually available for speech would not be permitted to impair free speech rights. At issue there was the right of the public to distribute literature on the streets of a company town. It is significant that there the private owner held far more than a temporary license in the facilities, it owned them outright, but it did not escape the duty of permitting their general use for speech.

The question here, therefore, is not whether the Commission might inhibit the station owners' "freedom of speech". It is whether the government may grant a station owner the right to censor speech over a public channel and deny an ordinary citizen access to the channel even when he has been attacked. To put this another way, are the free speech rights of the station owner so precious that ordinary citizens must be silenced completely for fear of inhibiting him?

The *Red Lion* decision rests on the conclusion that both station owners and citizens have free speech rights and both should be implemented

> "after having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioner's right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast."[42]

The language of Judge Learned Hand in upholding the Chain Broadcasting Rules is apt:

> "The Commission does therefore coerce their [the licensees] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might

[42] 381 F. 2d 908, 923 (D. C. Cir. 1967).

> have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. *The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . .*" *National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, 946 (SDNY, 1942) (emphasis ours).

Judge Hand went on to point out that the primary First Amendment rights were those of the public.

The time-tested rationale for the right of a minority to express abhorrent thoughts is that the best means of refuting obnoxious doctrine is competition with opposing ideas. *It is the availability of a reply which makes tolerable the protection of the original utterance.* This principle is illustrated by the recent *KTYM* decision. In that case, objections were filed to a renewal of license, alleging that the station had broadcast a series of anti-Semitic programs containing deliberate or recklessly false allegations against Jewish persons and organizations.

The Commission renewed the license without a hearing, expressly declining to put in issue the falsity of the material or whether the broadcasts were in the public interest, stating:

> "We do not hold that those broadcasts, or any similar broadcasts, were in the public interest, but rather, that it is in the public interest to have free speech on all subjects on licensed broadcast facilities provided only that all viewpoints are afforded a fair and equal opportunity for expression."[48]

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[48] *Complaint of Anti-Defamation League of B'nai B'rith against Station KTYM*, 7 P & F Radio Reg. 2d 595, 587 (1966), affirmed *sub nom, Anti-Defamation League* v. *F.C.C.*, 14 P & F Radio Reg. 2d 2051 (1968). In our view repeated programming of this kind with no serious effort to present alternative views is not in the public interest, even though opportunty to answer "personal attacks" is granted.

Since the Commission must find that KTYM's program service is in the public interest, the Commission can escape responsibility for its statements only if it ensures that the channel is available to all views.

If the television or radio service available in all or most service areas provided a reasonable cross-section of opinion on local and national issues, it might be argued that the public interest would be satisfied by presenting any public affairs programming, even if abusive and one-sided. But almost no public affairs programming is provided in sustaining time outside large cities. Paid time is monopolized by the views of a relatively small group of wealthy persons. Unless access is assured to all elements of the community, particularly racial minorities and the poor, broadcast freedom will remain freedom for the wealthy.

Equal access to the media has never been more important. See the recent *Progress Report of the National Commission on the Causes and Prevention of Violence* (*January 9, 1969*):

> "The media in this country have developed a tradition of being a forum for the presentation of divergent views, a market place of ideas. What are the criteria for access to the public through the media today? The question is important for the study of violence, because one of the minimum requirements for non-violent resolution of divisive social issues is that interested parties be given an opportunity to be heard. In a democratic society where ultimate power resides in the people, access to the mass media is essential for groups desiring peaceful social change. If important, discontented segments of our society are denied the right to be heard, subsequent resort to violence by these groups may perhaps be expected. Moreover, if a high value seems to be placed by the media on conflict and drama, perhaps to attract the large audiences necessary to economic well-being this may be a positive incentive

for groups to engage in violence. Violence itself may thus become a medium of communication, a means of access to the market place of ideas." (p. A-40)[44]

The Metropolitan Newspaper Analogy

The broadcasters have strenuously argued below and elsewhere that broadcast stations should be constitutionally indistinguishable from metropolitan newspapers.[45]

However, aside from the differences inherent in a licensing system, there are many imperfections in this analogy. Broadcast stations, particularly television stations, have

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[44] See also Barron, Jerome, "Access to the Press—A New First Amendment Right", 80 Harvard Law Review 1641 (1967).

[45] As stated by Mr. Minow in addressing the Conference on Freedom and Responsibility in Broadcasting, at Northwestern University School of Law on August 3, 1961:

> "After the issuance of the Blue Book, the NAB urged Congress to amend the Communications Act and give radio the same degree of freedom from governmental regulation of content as newspapers. In the hearings before the Senate Interstate and Foreign Commerce Committee on the matter (S. 1333, 80th Congress, 1st Sess.), Senator Wallace White, the Committee Chairman and one of the 'fathers' of the Communications Act, said that 'there is a vast difference in principle between the absolute right of anyone who wants to go into the newspaper business, and the necessarily limited right to operate a broadcasting station' (p. 120). He stated (p. 126): 'I do not accept in any degree that there is no difference between the power of Government with respect to newspapers and the power of Government with respect to radio communications . . . If you [radio people] are placing your feet on that foundation, [you] are just indulging in dreams. Because Congress will not stand, in the long run, for any such interpretation.' Other Senators were equally critical. Senator Edwin Johnson declared that the notion that 'radio presents a direct analogy to the press' is 'as fat-fetched as comparing an elephant to a flea.'" (Minow, *op. cit.*, pp. 88-89.)

become primarily vehicles for entertainment[46] rather than for news, information and discussion. As indicated above, the volume of controversial material in broadcasting is relatively small. Furthermore, the diversity of sources in the print media is vastly greater when account is taken of the multiplicity of trade papers, magazines, books, pamphlets, newsletters, hand bills, and the like.

It has been suggested that the broadcast media compete with the print media, and therefore, simply add to the diversity of sources. In fact, they have decimated the print media. Except for an audience of highly literate persons they are not really comparable. For vast elements of the population who do not seek to inform themselves about controversial public issues, the broadcast media are the only effective means of communication.

The multi-sensory effect of television breaks through to this group. The appearance of a familiar personality with an authoritative manner and illustrative pictures reaches a different and larger audience than printed symbols which require effort to understand and analyze.[47] Indeed, the vast superiority of television as a means of communicating advertising messages (including political advertising)[48] is the primary cause of the decline of metropolitan newspapers.

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[46] An example of the conflict between the entertainment and public information functions of broadcasting was the CBS decision to delay presentation of a speech by the President so as not to interfere with prime time programming. Friendly, *op. cit.*, pp. 251-2.

[47] Klapper, Joseph T., *The Effects of Mass Communication*, The Free Press, 1960, pp. 106-112. As the Court of Appeals said in *Banzhaf*, "It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard, if not listened to, but it may be reasonably thought greater than the impact of the written word" (14 P & F Radio Reg. 2d at p. 2087).

[48] The expenditures for "TV and radio" in the 1964 Republican presidential campaign were ten times the expenditures for "Newspaper and magazine ads". About 85% of Governor Rockefeller's media expenditures in the 1966 gubernatorial election were for television and radio. McNeill, *op. cit.*, pp. 232, 234. There has been a steady increase in the use of non-rational political spot announcements. *Ibid.*, pp. 182-227.

Another fundamental difference is that a newspaper or magazine is a random access device from which one can select the sports, the comics or the editorials, while a broadcast program is a continuum from which one takes all or nothing. Broadcasters therefore tend to direct programming to the broadest possible audience and to give little service to minority tastes and needs. A metropolitan newspaper can set aside considerable space for minority interests (e.g., opera, ballet, bridge, chess, shipping, antiques, fashions, art, food, travel), without pressing such material on the majority, or losing mass circulation. Television's need to retain the mass audience governs all its programming including public affairs programs. Thus, in Jackson, Mississippi, a television station may avoid local programming of special interest to the substantial Negro minority for fear of antagonizing the audience at which its advertising is principally directed.[49] The networks permit Negroes to appear but only in a way which is acceptable or interesting to their principal audience.[50] Television stations rarely present programming which will bore or offend the majority. This policy limits diversity of view. The

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[49] It was alleged that the only local program in which Negroes participated on station WLBT (Jackson, Mississippi) was a gospel singing show at 6:45 AM Sunday morning. The station advised the Commission that it had a policy against programs which discussed integration or segregation. *Office of Communication* v. *F. C. C.*, 359 F. 2d 994 (D C Cir., 1966).

[50] Thus, George Scott, one of the actors in *East Side—West Side*, asserted in connection with alleged network censorship:

> "There was constant blue-penciling of material by the Program Practices Department of CBS. . . . In a segment called 'No Hiding Place,' a story about block-busting by unscrupulous real-estate operators, there was a scene in which I was to ask a colored woman—played by Ruby Dee, who is herself a marvelously bright woman—to dance. The scene was edited out of the script by CBS. I insisted that it be put back in. It was, and we shot it. *Then* it was cut out of the footage by the network." TV Guide, Jan. 18, 1964, pp. 18, 21.

dominance of networks over broadcast content is far greater than the effect of wire services on newspapers.[51]

A network news program commands an audience of six to sixteen million persons.[52] By comparison, a metropolitan daily newspaper, such as the New York Times, has a circulation of less than one million copies. The number of persons who read a particular news item is probably much smaller.

POINT II

License renewal proceedings have not proved effective in obtaining compliance with the Fairness Doctrine; the public interest requires a direct and summary procedure.

The Office of Communication of the United Church of Christ was, we believe, the first public complainant in the history of the Communications Act to obtain a hearing on the overall performance of a station licensee applying for a three-year renewal term. The Commission charged it with the burden of proof and restricted its right to examine the station's program logs, program transcripts and other

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[51] Although newspapers use wire services and syndicated programs, they select freely from a variety of sources and rely primarily upon their local staffs. One observer measured a small group of daily newspapers and concluded that "about 36% of their content was from outside sources, syndicates and wire services." Wiggins, James Russell, *Freedom or Secrecy*, New York, Oxford University Press, 1964, p. 222.

[52] McNeill, Robert, *The People Machine*, Harper & Row, New York, 1968, page 5. According to a CBS survey, about 59% of the adult population of the United States watched or heard about Senator Joseph R. McCarthy's answer to Edward R. Murrow and 33% believed McCarthy had proved Murrow was a pro-Communist or had raised doubts about him. *Friendly, op. cit.*, p. 60.

material. As predicted by the Court of Appeals,[53] the task assumed by the Office of Communication proved very burdensome. Before the proceedings were initiated, a monitoring study was made employing about thirty persons. Approximately three years were spent in various proceedings before a hearing was held. The hearing itself took approximately three weeks, and resulted in over 1700 pages of testimony and many thousands of pages of exhibits. The proposed findings comprise several hundred pages. The hearings on the WXUR license renewal took an even greater time and were even more burdensome on the public parties. In both cases, personal attack violations were found, and in both cases renewal was recommended based on the overall record of the station.[54] Both are under review.

Regardless of the ultimate results it is unreasonable to expect that the victim of a personal attack will be willing or able to conduct proceedings of this type except in the most extraordinary circumstances. Even community organizations will rarely be able to finance and conduct such

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[53] "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases." *Office of Communication* v. *F.C.C.*, 359 F. 2d 994, at p. 1006.

[54] Renewal is dependent upon overall performance, not particular violations. *Letter to Cullman Broadcasting Company*, F.C.C. 63-849, September 18, 1963; *Letter to Honorable Oren Harris*, F.C.C. 63-851, September 20, 1963. Because of the drastic nature of renewal proceedings, they have not been either adequate or effective as a means of enforcing compliance with the F.C.C. regulations. Cf. *Head* v. *New Mexico Board of Examiners*, 374 U. S. 424, 434, n. 1 (1963).

proceedings. Thus, only where a licensee has committed persistent and outrageous violations is such action likely and even then no penalty may result because of superior performance in other types of programming.

Furthermore, a non-renewal of license many years following the violations has only a limited value in protecting the public interest. The purpose and value of free expression, after all, is as a guide to intelligent social action by an informed citizenry. Unless one's voice can be heard when action is still possible, the right to speak is a hollow one. The inflammatory editorials on Station WLBT and the barrage of Communist charges against civil rights advocates reached their height in the period before the Oxford riots on September 30, 1962. Disciplinary action which might take place hereafter cannot moderate the passions or prevent the death and bloodshed which then occurred.

In 1960 a Subcommittee of the Senate Committee on Commerce was appointed to make a complete study of federal policy on "uses of Government licensed media for the dissemination of political opinions, news, . . . and the presentation of political candidates". One of its recommendations was that:

> "The Federal Communications Commission should reform its internal procedures for the handling and processing of 'equal-time' and editorial 'fairness' complaints. The time lag at the Commission must be cut to the minimum. *Here are issues in which time is most certainly of the essence.*" (Emphasis added)[55]
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> "The physical handling of such complaints—in the mail room—at the first point received by the Commission must be so organized and staffed *so that the ac-*

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[55] Senate Report No. 994, pt. 6, 87th Cong., 1st Session, p. 10.

tion to ascertain all necessary facts on a given complaint begins within 24 hours of receipt of same by the Commission."[56]

Thus, it is clear that the Fairness Doctrine, as applied prior to the promulgation of the Personal Attack and Political Editorial Rules, did not protect the public; there was an imperative need for more effective procedures to compel licensees to perform their trusts.

POINT III

The Personal Attack and Political Editoral Rules are a modest first step toward balanced programming on controversial issues.

It is by no means accidental that the broadcasting industry has initiated its first legal challenges to the Fairness Doctrine eighteen years after its adoption. The fact is that for all these years the Doctrine has been little more than a pious expression of hope, complied with by some responsible licensees and disregarded by others. The Commission, with its customary caution and solicitude for the industry, has contented itself with an occasional reiteration of its views and a few warnings to violators.

According to *Newsweek* (July 4, 1966, p. 80):

> "There has so far been no rein whatsoever on the radio of the right. The FCC's 'fairness doctrine' declares that broadcasters must give equal time for reply to any subject or individual attacked, but it has no control over the virulence of the attack. Besides, the doctrine is seldom invoked. 'FCC enforcement in this area is terrible,' says one Senate staffer." See also: "Is the FCC Dead?", *The Atlantic,* July, 1967, page 29.

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[56] *Ibid.*, p. 11.

One thing is clear: self-regulation has been given every reasonable chance and has failed.

The new Rule will, for the first time, make it possible for one who is attacked and denied an opportunity to reply to obtain an immediate ruling at reasonable cost, and, where appropriate, a Commission order. This is only a modest advance. It will not provide a satisfactory procedure for correction of other Fairness Doctrine violations, such as programming on only one side of a public issue. However, the Commission can reasonably deal first with personal attacks and political editorials because these are often the matters where an immediate response is most necessary and where the appropriate person to make the response is easily identified.

Petitioners make the inconsistent arguments that the Rules are unnecessary to enforce compliance, and that the enforcement of the Rules would create such practical difficulties as to discourage all controversial issue programming.

The latter argument is by no means new. When the Fairness Doctrine was first announced in 1949, it was met with predictions that controversial programming would be perilous. To the extent that these new predictions may represent a threat to discontinue programming on controversial issues, the Commission has ample authority to deal with it. The same kind of predictions were made at the time of the last great "freedom of speech for broadcasters" controversy, i.e., when the Chain Broadcasting Regulations were adopted. The introduction to a pamphlet published by CBS at the time is attached as an exhibit to this brief.

Any licensee who has an honest desire to comply with the Fairness Doctrine, including the Personal Attack and Political Editorial Rules, should welcome an opportunity to be advised currently as to its obligations, instead of waiting until its license is in jeopardy before learning what it should do.

The alleged vagueness of the Rule presents no constitutional difficulty because a licensee has only to apply to the Commission for a ruling on a particular question and, in any event, will not be subjected to sanctions, absent a willful violation. See *Screws* v. *U. S.*, 325 U. S. 91, 102 (1945).

The Rules do not impose an undue financial burden.

It is usual, in granting a public franchise or privilege, to impose conditions protecting the public interest. There has been no showing that the financial cost of providing free time to respond will constitute an excessive burden. Despite the fact that the Fairness Doctrine has been in effect for eighteen years, station licenses have continued to increase in value.

In 1966 the highest prices in the history of broadcasting were paid for an FM station ($850,000 for WRFM, New York), and for a UHF television station ($3,900,000 for Channel 47, in Fresno, California.[57] Records were also set in 1967, when over $21,000,000 was paid for a television station in Houston, Texas.[58]

These prices reflect the stations' enormous profits in relation to investment in tangible broadcast property. In 1966, the television industry earned about $493 million on a depreciated cost of about $550 million.[59]

The broadcasting industry's income (before Federal income tax) has increased every year since 1959:

From 1959 to 1960 the increase was 9.6%; from 1960 to 1961 it was 8.1%; from 1961 to 1962 it was 33.3%; from 1962 to 1963 it was 12.1%; from 1963 to 1964 it was 22%;

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[57] F.C.C. 32nd Annual Report, pp. 95-96.

[58] F.C.C. 33rd Annual Report, p. 32.

[59] *Ibid.*, pp. 173, 176.

from 1964 to 1965 it was 8.1% and from 1965 to 1966 it was 12.3%.[60]

There is no basis for the suggestion that the burden of furnishing time to reply is comparable to the threat of a $500,000 libel judgment for a single attack. See, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), or a $10,000,000 claim (see *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 137 (1967).

Indeed, it should be recognized that the *New York Times* and *Curtis Publishing* cases represent a difficult accommodation of conflicting social values, the public interest in free speech on the one hand and the individual interest in reputation and privacy on the other. In striking this balance, the availability of a right of access for self-defense may well make tolerable a broader freedom of discussion. Such a right provides a remedy of value to the victim at a modest cost to the attacker. It provides a middle ground between injury without remedy and huge awards for unintended libels.[61]

CBS has submitted below an appendix listing certain "arguable" personal attacks which appeared in its programming. We urge the Court to study any such appendix with care. We believe that almost all of the quoted criticisms fall short of attacks on honesty, integrity or character or like personal qualities. We believe that network programs (other than on-the-spot news and news interviews) rarely contain such attacks, that there are probably less than ten a year, and that they are made only on organizations and individuals who have been the subject of considerable official scrutiny, e.g., the Ku Klux Klan, James

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[60] F.C.C. Annual Reports, 27th p. 62; 28th p. 78; 29th p. 84; 30th p. 82; 31st p. 127; 32nd p. 121; 33rd p. 170.

[61] See Note, *An Alternative to the General Damage Award for Defamation*, 20 Stanford Law Review 504 (1968).

Hoffa and Congressman Adam Clayton Powell. We believe that in almost every case where such an attack is made (as in news documentaries), an opportunity to respond is given within the program which contains the attack. We believe, in short, that the extravagant predictions of cost, inconvenience and inhibition which the broadcasters make are founded on nothing but ingenuity and imagination. We find it difficult to believe that anything could be less robust than the discussion presently taking place on network documentaries. The best evidence of this is the fact that the Senate Study of the Fairness Doctrine indicated that there wasn't a single personal attack complaint against a network out of 173 such complaints during a test period (See p. 12, *supra*).

The Commission has already indicated by both words and acts its willingness to consider changes in the rules as they appear to be in the public interest. The rules have been amended twice since they were adopted. In its opinion accompanying the order the Commission stated:

> "It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires." (32 Fed. Reg. 11532, par. 4)

One thing is clear. Although the Commission has been greatly concerned with the problem of fair use of the airwaves for over two decades, it has moved very slowly in taking effective action to force compliance with the Doctrine, apparently hoping that with each restatement of its views, voluntary compliance would be forthcoming.

The broadcasting industry has no reason to fear that the Commission will disregard its interests in applying the new Rules.

CONCLUSION

This Court should find that the Commission's Personal Attack and Political Editorial Rules are reasonable and proper, should affirm the judgment of the Court of Appeals for the District of Columbia Circuit and should reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February, 1969.

Columbia Broadcasting System, What the New Radio Rules Mean (New York: Columbia Broadcasting System, 1941), pp. 3-4.

What the New Radio Rules Mean

SOMETIMES you have to take a thing away from people to get them to realize what it means to lose it.

That is going to be true of radio broadcasting as we know it in America unless people understand what is happening and do something about it.

The Federal Communications Commission has adopted eight new "regulations." Most people will never see them or read them. They are wrapped up in a thick government report. Like a bitter pill, they are sugar-coated with nice words and high-sounding phrases about the public interest. Then, to make the deception complete, they are handed out with a press release that would make people think the Commission is protecting what it is actually wrecking. Like calling a blitzkrieg a rescue party.

In its report, and in subsequent utterances by its Chairman, the Commission bolsters its attack on the networks by the loose, unsubstantiated use of such words as "monopoly," "domination," and "control." Since the public is interested not in epithets, but in the truth about American broadcasting practices, we call particular attention to pages 23 to 32 of this analysis which deal with the realities of these aspects of network broadcasting.

Columbia Broadcasting System here states, and in subsequent pages demonstrates, that, instead of benefiting the public, instead of promoting sound competition, instead of improving radio broadcasting, what the Commission proposes to do will have these effects:

1. It will threaten the very existence of present network broadcasting service, bring confusion to radio listeners, to radio stations, and to the users of radio, and deprive business of an orderly and stable method of presenting sponsored programs to the people.

2. It will threaten the continuance to radio listeners of their favorite sustaining programs sent out by the networks, such as the New York Philharmonic-Symphony broadcasts, educational and religious programs, world news service. We do not see how, under these "regulations," Columbia or anyone else can afford to, or has any real inducement to, produce and broadcast programs of this kind and to maintain and improve the character of its public service.

3. It will establish radio monopolies in many sections of the country which are now served by competing stations and competing networks and deprive hundreds of radio stations of an important source of revenue, besides seriously affecting their opportunity to build up their local audiences through network programs.

4. In weakening the ability of the radio industry to give the kind of broadcasting service that people have come to demand, it may, in the end, encourage the government to take over broadcasting altogether. Meantime it opens the door to the complete domination of radio by whatever government happens to be in power.

5. It will cripple, if it does not paralyze, broadcasting as a national service at a time when radio should be encouraged to continue and enlarge its contribution to national unity and morale.

INDEX

Page

INTEREST OF THE AFL-CIO 2

ARGUMENT 4

The Public Has A Constitutionally Protected Right Of Access To The Airwaves To Present Variegated Views On Issues Of Public Importance

CONCLUSION 22

Citations

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 22

Amalgamated Food Employees v. *Logan Valley Plaza*, 391 U.S. 308 (1968) 2, 9, 12, 14

Associated Press v. *National Labor Relations Board*, 301 U.S. 103 (1939) 19

Associated Press v. *United States*, 326 U.S. 1 (1945) 8, 19

Cameron v. *Johnson*, 390 U.S. 611 (1968) 12

Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 (1961) 22

Cox v. *New Hampshire*, 312 U.S. 569 (1941) 10, 19

Davis v. *Massachusetts*, 167 U.S. 43 (1897) 7-8

Federal Communications Commission v. *Pottsville Broadcasting* Co., 309 U.S. 134 (1940) 14

Hague v. *CIO*, 307 U.S. 496 (1939) 2, 8-9, 11

Hannegan v. *Esquire*, 327 U.S. 116 (1958) 15

Jamison v. *Texas*, 318 U.S. 412 (1943) 9

Lamont v. *Postmaster General*, 381 U.S. 301 (1965) 8, 15, 16

Lovell v. *Griffin*, 303 U.S. 444 (1938) 8, 9-10

Marsh v. *Alabama*, 326 U.S. 501 (1946) 14

Martin v. *Struthers*, 319 U.S. 141 (1943) 8

Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 18

NAACP v. *Button*, 371 U.S. 415 (1963) 19

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 4-5, 6

Page

National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) 2

National Labor Relations Board v. *Stowe Spinning Co.*, 336 U.S. 226 (1949) 2

New York Times v. *Sullivan*, 376 U.S. 254 (1964) 2-3, 11, 16, 20

Niemotko v. *Maryland*, 340 U.S. 268 (1951) 13, 18

Office of Communications v. *Federal Communications Commission*, 359 F.2d 694 (1967) 14

Screws v. *United States*, 325 U.S. 91 (1945) 21

Schneider v. *State (Town of Irvington)*, 308 U.S. 147 (1939) 2, 9, 10, 11, 12, 17

Shelton v. *Tucker*, 364 U.S. 479 (1960) 21

Smith v. *California*, 361 U.S. 147 (1959) 16

Speiser v. *Randall*, 357 U.S. 513 (1958) 16

Staub v. *Baxley*, 355 U.S. 313 (1958) 2

Thomas v. *Collins*, 323 U.S. 516 (1945) 2

United States v. *Associated Press*, 52 F.Supp., 362 (1943) 8, 11, 15

STATUTES:

Communications Act of 1934 as amended, 47 U.S.C.:

Section 153 5

301 ..... 5, 6, 14

315(a)(4) 6, 16

501 ..... 5, 6

MISCELLANEOUS:

Kalven, *Broadcasting and the First Amendment*, 10 Journal of Law & Economics, 15 (1967) 15, 21

Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum*, 1965 Supreme Court Review 1 ..... 9, 10-11

Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (Fairness Primer)*, 29 Fed. Reg. 10415 (1964) 6

Report of Editorializing by Broadcast Licenses, 13 FCC 1246 (1949) 2, 6, 14, 18

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the Petitioners' position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 122 national and international labor unions having a total membership of approximately 12,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinion below, jurisdictional statement, questions presented and the statutory provision involved are set out at pp. 1-8 of Petitioners' brief.

INTEREST OF THE AFL-CIO

The labor movement is, and has always been, confident of the justice and appeal of its programs and policies. Secure in that confidence it seeks, and has traditionally sought nothing more than the opportunity to present its views to the American public in general and to working men and women in particular. This opportunity has frequently been denied. Prior restraints though licensing laws have been employed to seal off entire states from union organizers, see, *Thomas* v. *Collins*, 323 U.S. 516 (1945). The streets, parks, and meeting halls of large industrial cities have been closed to union solicitations and handbills, *see, Hague* v. *CIO*, 307 U.S. 496 (1939); *cf., Schneider* v. *State (Snyder* v. *Milwaukee)*, 308 U.S. 147, 155 (1939). Company towns have been declared off limits to unions, *see National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949). Door-to-door solicitation has been barred, *see Staub* v. *Baxley*, 355 U.S. 313 (1958). Privately owned streets open to the public at large have been closed to those who wish to spread the union's views, *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968). And organizers who seek to spur organization have been refused access to the plant they seek to organize, *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 451 U.S. 105 (1956). As the foregoing citations indicate, resistance to the spread of labor's message is hardly a matter of history. In combating this resistance the fact that this Court has established the proposition that the right of access to the streets of those who seek to communicate is a basic civil right protected by the First Amendment, *Hague* v. *CIO, supra*, 307 U.S. at 515 has been a most formidable aid.

It is our view, as we demonstrate herein, that the public's right of access to the airwaves to present all points of view on issues of public importance should also be regarded as a basic right of free men protected by the First Amendment. Given radio's and television's vast potential for the "advancement of informed public opinion," *Report on*

Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 (1949) and our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open," *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964), the First Amendment requires that the public airwaves be open to the members of the general public.

If such a rule of law is not established, the loss to the labor movement, as well as to all other members of the general public who do not hold broadcast licenses, will be a substantial one. We merely note two examples here, both of which have been brought to the attention of the Commission to indicate the nature of that loss. In the proceedings which led to the instant case, the International Typographical Union, AFL-CIO, noted:

> "Since December 1964 there has been a strike by Lafayette Typographical Union No. 832, one of the affiliates of the International Typographical Union, against the publisher of the Lafayette Advertiser, a daily newspaper which is the only newspaper in the Lafayette area. There has been a refusal of this company to recognize the union, a refusal which is presently the subject of a complaint against the company issued by the General Counsel of the National Labor Relations Board. The issue is obviously one of great public importance and interest in the community and for obvious reasons the struck newspaper is not available to the union as a medium for the expression of its views. Accordingly, the union has made strenuous efforts to obtain air time on the local broadcasting stations. It offered to submit the script for its proposed program for review by the station. In every instance the union was denied the opportunity to purchase the time. The derelection of the broadcasters in Lafayette is noteworthy in this rule-making proceeding because it is symptomatic of a prevalent practice contrary to the public interest as defined by Congress."

This is not an isolated example. All broadcasters are employers and it is too often true that their self-interest in keeping unions weak affects their news judgements, *see* Hearings, Administration of the Labor-Management Rela-

tions Act by the National Labor Relations Board, before the Subcommittee on the National Labor Relations Board, 87th Cong., 1st Sess. (1961) Part I, 292-331.

This past year the Arkansas State AFL-CIO submitted amendments to the state's Workmen's Compensation Law by securing a petition signed by the requisite number of registered voters to put the matter on the ballot. This proposal was enacted into law by a 7500 vote margin out of 500,000 votes cast. The opposition campaign to this measure was vigorously pursued and according to public opinion polls changed strong public support for the measure into a close race during the week or two immediately preceding the election. This opposition campaign was carried out primarily through advertisements in newspapers and on radio and television. The Arkansas State AFL-CIO, the only major supporter of the measure, was not able to approximate the amount of money spent on advertising by its opponents. Television stations serving Arkansas viewers were, therefore, asked to give time to the State Federation so that the voters would hear both sides of the issue. Generally, because of the provisions of the Communications Act the stations cooperated. Nevertheless, even at this late date in the history of the Act, and despite the fact that their duty was clear, two stations refused. The matter of their refusal is now pending before the Commission.

The foregoing makes the AFL-CIO's interest in this proceeding manifest and it is because of this interest that we have sought to acquaint the Court with our views.

ARGUMENT

The Public Has A Constitutionally Protected Right of Access To The Airwaves To Present Variegated Views On Issues Of Public Importance.

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 212-213 (1943) this Court noted:

> "Without licensing the result [would be] confusion and chaos. With everybody on the air, nobody could

be heard . . . [This] is attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile."

To deal with the consequences of these facts of physics, §301 of the Communications Act of 1934 as amended, 47 U.S.C., §301 provides:

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio [in or affecting interstate commerce] except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 153(h) provides:

A person engaged in radio broadcasting . . . shall not be deemed a common carrier."

And §501 of the Act, 47 U.S.C. §501 provides:

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of

not more than $10,000 or by imprisonment for a term not exceeding one year, or both . . ."

Thus, the penal laws of the United States assure that only those persons who have received a federal license enjoy the right to practice electronic journalism in the United States. If there were nothing more in the governing law, those who unsuccessfully seek a federal license, or those who unsuccessfully seek air time from a licensee would be barred, by governmental action, from reaching the general public through the airwaves—barred, in other words, from setting up their own electronic "press" to propagate their views. The situation which would obtain is equivalent to that which would result if the Government were to decree that only a limited number of licensed presses might be operated in this country, and that the public thoroughfares and the mails might be used only to circulate the product of these presses. If Congress had stopped at this point, thereby creating an unrestricted monopoly position over a valuable public communications' resource for those in the broadcasting industry, there would, we submit, be no doubt that the Act would be inconsistent with the First Amendment, *see* pp. 14-15 *infra*. But §§301 and 501 do not comprise the entirety of the governing law. For the Act imposes on licensees an "obligation . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," §315(a)(4); *see also, Report on Editorializing by Broadcast Licenses,* 13 FCC 1246 (1949); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (Fairness Primer)* 29 Fed. Reg. 10415 (1964).

The Radio Television News Directors Association (RTNDA) and the National Broadcasting Company (NBC) argue that the limited right of access to the airwaves granted by §315 places burdens on them which generate self-censorship. On this basis they argue that the §315 requirement that licensees must afford a reasonable opportunity for the discussion of conflicting views is incompatible with their right of free speech guaranteed by the First

Amendment.[1] It is our view that the Government has the power, indeed the duty, to promote variegated speech on the airwaves by assuring non-licensees an opportunity to exercise their right of free speech, and that the financial and practical costs of such a policy do not serve to render it unconstitutional. With the exception of *National Broadcasting Co., supra,* 319 U.S. at 226-227, this Court has not had occasion to apply the basic principles of the First Amendment to broadcasting. Nevertheless, we suggest that the prior decisions of this Court do point toward the proper resolution of the instant case.

The Government stands astride three important avenues for the circulation of views—public thoroughfares, the mails, and the airwaves. As we view the matter, the basic issue here is the right of access of the general public to the third of these valuable resources for communication. While the law on the exact nature of this right is relatively undeveloped, there is a substantial body of law on the right of access to public thoroughfares of those who seek to exercise their First Amendment rights. As we shall now demonstrate, that body of law presents the appropriate starting point from which to reason toward a solution to the problem present here.

1. In *Davis* v. *Massachusetts,* 167 U.S. 43, 47 (1897) *affirming* 162 Mass. 510 (1895), this Court endorsed the following language of Mr. Justice Holmes, then a member of the Supreme Judicial Court of that State:

> "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the

[1] The Columbia Broadcasting System, Inc. has taken the narrower position that, assuming *arguendo* that this requirement of §315 is constitutional the Commission's Rules on Personal Attacks in issue here are not justified by the Act and conflict with the First Amendment.

> dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."

It has since been recognized that the inhibitions *Davis* placed on the effective enjoyment of First Amendment rights are intolerable and that case is no longer good law. For the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value," *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). Free circulation is of the essence since the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (US DCSD NY 1943) (L. Hand, J.). "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . . Freedom to publish means freedom for all and not for some." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

It is plain that allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail "the widest possible dissemination of information from diverse and antagonistic sources." For it would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors, *see, Martin* v. *Struthers,* 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General,* 381 U.S. 301, 306-307 (1965). Thus, as Mr. Justice Roberts stated in *Hague* v. *CIO,* 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

> purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient time, been a part of the privileges, immunities, rights, and liberties of citizens." *See also Schneider* v. *State (Town of Irvington)*, 308 U.S. 147 (1939); *Jamison* v. *Texas*, 318 U.S. 412, 415-416 (1943); *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968).

As Professor Kalven has noted, Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum*, 1965 Supreme Court Review 1, 12, 13:

> "There is the aura of a large democratic principle [at work in *Hague*]. When a citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement . . . In an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."

This right of access to public thoroughfares in order to communicate is, of course, not limited to the publishers of newspapers and magazines of general circulation. It was fought for and won by minority groups, such as the Jehovah's Witnesses and organized labor, whose needs and finances have simply required them to get their message to the general public on occasion. In our pluralistic society, dedicated as it is to dissemination of information from diverse and antagonistic sources, this occasional use of First Amendment freedoms enjoys a claim to protection equal to that of the public press:

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation

> comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin, supra,* 303 U.S. at 452.

While the First Amendment status of handbilling and leafletting on public thoroughfares invalidates much in the way of governmental regulation, it does not prevent regulation aimed at orderly expression: "A person could not exercise this liberty by taking his stand in the middle of a crowded street contrary to traffic regulations and maintain his position to the stoppage of all traffic." *Schneider* v. *State, supra,* 308 U.S. at 160. Thus, in *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), affirming 91 N. H. 137 (1940), this Court upheld the Supreme Court of New Hampshire in sustaining a conviction for parading without a permit since the licensor was limited exclusively to considerations of time, place and manner and in effect to the Newtonian principle that you cannot have two parades on the same corner at the same time: "A license to permit [a parade on a public way] may not be required as a form of censorship, but a license to permit its enjoyment in fair adjustment with the enjoyment of other relations and conditions is not understood to be under the ban of the federal constitution," 91 N. H. at 148; *cf., National Broadcasting Co., supra,* 319 U.S. at 226-227.

As Professor Kalven points out, 1965 Supreme Court Review at 23-24, *Schneider* and *Cox* v. *New Hampshire* bring into focus a classic distinction in speech theory:

> "It is the distinction between regulations like Robert's Rules of Order and regulation of content. No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules, and any concessions on this front should not be taken as relevant to the questions most central to speech theory—questions of control of content. The point then is that, in any theory, speech has always been dependent on some commitment to order and etiquette . . . Listen for a moment to Alexander Meiklejohn describing a town meeting, [Meiklejohn, Political Freedom 24-28 (1960)]:
>
> > 'In the town meeting the people of a community assemble to discuss and to act upon matters of public

> interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridge. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen . . . The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed . . . The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged . . .
>
> 'These speech-abridging activities of the town meeting indicate that the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right.' "

The lessons of *Hague, Schneider* and their progeny can profitably be summarized as follows: The First Amendment embodies a "profound national commitment to the principle that *debate* on public issues should be uninhibited, robust and wide open," *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964). (Emphasis added). We emphasize the word "debate" because the First Amendment protects effective access to the general public for the full range of potential publishers rather than for just a chosen few. We have "staked . . . our all" on the proposition that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection," *United States* v. *Associated Press, supra,* 52 F. Supp. at 372. For this reason, the First Amendment requires governmental action to facilitate speech by removing

obstacles to the circulation of ideas through public channels of communication even though such action may create substantial burdens. Use of the streets to communicate may complicate traffic control, may increase the expense of providing police protection and maintaining sanitation, and may disadvantage abutting business men who wish to be free of the message of unions, consumer groups and the civil rights movement. Within wide limits, *see Cameron* v. *Johnson*, 390 U.S. 611 (1968), these costs are acceptable for "this Court has characteized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used," *Schneider, supra*, 308 U.S. at 161. Indeed, the force of the First Amendment right of access to public facilities appropriate for communication is such that where interference with the right to circulate views is shown, it is for the Government to justify the abridgement, not for the speaker to justify his right to inform, for the prinicples underlying the First Amendment are his justification. For this reason, so far as we are aware, there has never been a First Amendment case in this Court in which a speaker seeking the right to use a particular medium has been required, as a precondition to the exercise of this basic right, to establish that alternative channels of communication are insufficient for his purposes:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra*, 308 U.S. at 163; *see also Logan Valley Plaza, supra*, 391 U.S. at 323-324.

Nevertheless, as *Schneider* and *Cox* v. *New Hampshire* demonstrate, restrictions on the circulation of views which flow from regulations designed to promote orderly access

to a public facility, and not to ban or restrict access unduly, are proper. Such regulation is not anathema; instead, it is inherent in the very concept of free public debate. In enacting and applying these rules of order, however, the Government must follow a course of neutrality. A ruling that only the American Legion, the Consumers Union, the NAACP, or the Teamsters could use the streets of a city to make their views known could not pass muster:

> "The only questions asked of the witnesses at the hearing [which resulted in a denial of permission to use a public park for a meeting] pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Wisnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.
>
> ". . . In this Court, it is argued that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday-school picnics." *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951).

2. The basic approach governing access to the streets in order to communicate is applicable here and justifies government action to assure "reasonable opportunity for the discussion of conflicting views on issues of public importance" on the airwaves.

First, there can be no doubt that the airwaves are an appropriate public facility for the exercise of the right of free speech: "Basically, it is in recognition of the great contribution which radio can make in . . . the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of

the day . . . that portions of the radio spectrum are allocated to that form of radio communications known as radio broadcasting." *Report on Editorializing*, 13 FCC at 1249. Thus, the underlying rationale for the development of this resource is to facilitate the exchange of ideas and information. It is true, of course, that this development is undertaken by private licensees rather than by the Government itself, but §301 of the Act expressly declares that the airwaves remain under the ultimate ownership and control of the United States, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). "A broadcast license is a public trust subject to termination for breach of duty," *Office of Communications* v. *Federal Communications Commission*, 359 F.2d 964, 1003 (CA DC Cir., 1967). Moreover, as we noted at the outset, the Government's role in the development of radio and television includes an undertaking, backed by the criminal law, to prevent nonlicensees from broadcasting. Since government action thus permeates this field, there can be no doubt that the First Amendment claims of those who seek access to this medium cannot be disregarded. Radio and television stations are not the private preserve of the licensees. Just as one who is the "owner" of a public thoroughfare cannot close it to those who seek to exercise their right of free speech, *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Logan Valley Plaza, supra*, 391 U.S. at 315-325, licensees, who do not have a property right to stand on, cannot claim a privilege broader than that of the Government, to bar reasonable access to that facility by members of the public.

Second, the Constitution certainly permits, and indeed requires, governmental action designed to facilitate access to the airwaves by members of the public. Despite the weighty claims of travelers, the First Amendment protects the right of access to the streets of those who seek to exercise their First Amendment rights, and as we have pointed out, this right of access is not limited to the public press, *see* pp. 9-10, *supra*. Moreover, the Government is barred from closing the mails to those who wish to use that medium

to transmit their ideas, *see, Hannegan* v. *Esquire*, 327 U.S. 116 (1958), *Lamont, supra*, 381 U.S. 301. Thus, the use of these facilities for communication is considered a basic right of free men, *Hague* v. *CIO, supra*, 307 U.S. at 515. Given radio's and television's vast potential for the "advancement of informed public opinion" and our devotion to the proposition that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection," *Associated Press, supra*, 52 F. Supp. at 372, the First Amendment requires that the public airwaves be open to the members of the general public. The airwaves cannot, consistent with the Constitution, be made the exclusive domain of those in the business of broadcasting.

Third, the foregoing does not mean that the Government cannot enact rules of order to govern the use of the airwaves. Such rules are consistent with the First Amendment. They are, indeed, a necessary condition for implementing the principles of free speech. Just as experience has taught that two parades on one corner may be expected to produce disorder without communication, and that a town meeting without a moderator does not advance the free flow of ideas; it has also taught that unrestricted use of the airwaves produces chaos, *National Broadcasting Co., supra*, 319 U.S. at 212-213. Thus restrictions on access are warranted, even though "freedom of utterance is thereby abridged to many who wish to use the limited facilities of radio" *Id* at 226-227. But where the subject is an "issue of public importance" the very concept of rules of order requires neutral rules that do not favor one side or the other. The precepts of the First Amendment imply that as to debatable topics there shall be debate. Naturally, in pursuing this goal, the Government cannot constitutionally require that "*each* speaker must be fair to both sides," Kalven, *Broadcasting and the First Amendment*, 10 Journal of Law & Economics 15, 47 (1967) (emphasis in original); but as moderator it has an affirmative obligation to assure that both sides are heard. That, as we understand it, is what

Congress sought in §315; and for the reasons set out thus far, we submit that this provision therefore promotes the basic aims of the First Amendment.

3. The counterarguments of the Respondents as developed in the court below suffer from a basic error of omission. Throughout their briefs to the Seventh Circuit, there is not a single mention of the First Amendment rights of non-licensees who are denied access to radio and television by the combined force of the Government and its licensees. The instant case is argued as if it were a contest between the Government, acting to suppress criticism, and the licensees, acting to preserve a free press. As we have attempted to demonstrate, this view of the matter distorts reality. The question truly at issue here is whether the Government can act to effectuate the right of the general public to speak, as well as to hear, without offending the First Amendment. As we have stressed, the answer to this question is that the Government has a constitutional obligation to effectuate this right by enacting rules designed to assure that licensees will air "conflicting views on issues of public importance." Members of the general public are not limited to the right to hear the uncensored views of broadcasters, a right protected by both the Constitution and §326 of the Act. They also have a right to speak on the public airwaves, and this right too is protected by the Constitution and under the Act by §315.

In cases such as *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Smith* v. *California*, 361 U.S. 147 (1959); *New York Times*, *supra*, 376 U.S. 254 and *Lamont*, *supra*, 381 U.S. 301, upon which Respondents rely, this Court has been quick to protect First Amendment values by striking down laws which placed burdens or inhibitions on free speech. The rationale of this line of authority is not applicable here. For in each of these precedents the Court was required to make a judgment for or against speech. The question *Speiser*, *Smith* and *New York Times* presented was whether free speech was to be sacrificed to serve some other social interest. The decision arrived at demonstrates the continuing

force of Mr. Justice Roberts' statement in *Schneider, supra,* 308 U.S. at 161: "this Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used." It is for this reason that this Court has refused to countenance even relatively minor inhibitions on the right to speak.

But the basic insight of *Schneider* cannot be made the key to the problem presented here for whether the instant decision goes for the Petitioners or the Respondents a free speech interest will be served. If the decision is for government regulation which secures access to the airwaves for the public the interest served will be that of the multitude of citizens who are not licensees; if it goes for the Respondents the interests served will be that of the few who are licensees. By the same token, no matter which way this Court turns, the right of free speech of one group or the other will be burdened. If the Court should hold that there is not a right of access to radio and television for members of the public the burden imposed will be complete suppression of their right to reach the radio and television audience. And this suppression cannot be justified on the ground that there are other media available: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schneider, supra,* 308 U.S. at 163.

On the other hand, if the Court should hold that the public does have a right of access to radio and television the free speech right of broadcasters will be burdened in that their speech on public issues will be "conditioned . . . upon [their] sending tapes or transcripts to persons affected, making available free broadcast time for reply, facilitating the presentation of opposing views which may be abhorrent to [them], disrupting [their] program schedule, or any combination of these." (RTNDA Brief to the Seventh Circuit 26). These burdens are *de minimus.* Certainly they are as nothing when compared to the burdens Respondents seek to have imposed on non-licensees, the burdens imposed

by the facts of physics ,or the burdens sustained by this Court in *National Broadcasting Co.* Indeed, a holding that a broadcaster must open a public channel of communication to its owners free of charge does not impose a constitutionally cognizable burden upon him: "Freedom of speech . . . [is] available to all, not merely to those who can pay their own way," *Murdock* v. *Pennsylvania,* 319 U.S. 105, 111 (1943). Nor is it accurate to say that the facilitation of the presentation of opposing views which are abhorrent to him injures a broadcaster in any constitutional sense: "The freedom of speech protected against governmental abridgement by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement." *Report on Editorializing,* 13 FCC at 1256, *see also, Niemtko, supra,* 340 U.S. at 227-228. Moreover, any disruption of program schedules which may result, while perhaps a financial and practical burden, does not approximate the burdens which would be imposed on the free speech rights of others by holding for Respondents. For we think it plain that there are limits to the self-censorship which broadcasters may practice to avoid this burden. The Government cannot require licensees to take any particular position on controversial "issues of public importance," but it can require that such issues be raised and explored on the airwaves. Government action to facilitate and encourage discussion is not contrary to the precept of the First Amendment; such action does not impose an unconstitutional condition on the right of licensees:

> "The Commission does therefore coerce their [the licensees] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . ." *National Broadcasting*

Co. v. *United States*, 47 F. Supp. 940, 946 (US DC SD NY, 1942) (L. Hand, J.).

It is precisely because there is a free speech interest on both sides that the approach of *Cox* v. *New Hampshire* should govern the disposition of this controversy. For *Cox* illustrates the proper approach to regulation in the interest of orderly and variegated speech. Such regulation which furthers the interest in "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press, supra,* 326 U.S. at 20, is lawful even though the burdens imposed on those who would monopolize public discourse are considerable. For the overriding free speech interest is not that of the putative monopolist; it is the interest of those who, absent the regulation, would be denied any opportunity to speak. Just as the two *Associated Press* cases (*Associated Press, supra,* 326 U.S. 1; *Associated Press* v. *National Labor Relations Board,* 301 U.S. 103, 132 (1939)) rest on the recognition that there is a certain price the press must pay as a participant in our social system, *Cox* v. *New Hampshire* rests on the recognition that there is a price that speakers must pay as participants in a dialogue. The First Amendment protects advocacy channeled through the judicial process, *NAACP* v. *Button,* 371 U.S. 415 (1963); and there can be no doubt that this right would be utilized more freely if judgment went for the Plaintiff as soon as he stated his claim without affording the Defendant an opportunity to answer. But such a proceeding would make a mockery of the legal system and no one suggests that the cost incident to a balanced presentation of views tends to inhibit potential plaintiffs and imposes a price too high to pay. But the same token, the mere fact that access to the airwaves may prove a burden to broadcasters is insufficient to demonstrate a need for one-sided debate on public issues on the airwaves.

4. There can be no escape from the proposition that the Government has the power and the duty to set up rules of order designed to assure that members of the public will have a "reasonable opportunity for the discussion of con-

flicting views on issues of public importance" on the airwaves. In pursuing this goal the core value at stake is access of the public to the airwaves in order to enrich and diversify the discussion of issues of public importance. As the Respondent, CBS, pointed out below there is a question as to whether the Personal Attack Rules in their present form are adequately confined to furthering that goal. Not every personal attack raises a point of personal privilege. And to the extent that *New York Times* is relevant here at all it does point toward the conclusion that protection of one's interest in an unblemished reputation is not the prime concern of the First Amendment. Thus, in dividing the limited air time open to the public it might be best to focus on personal attacks that go to the substance of debatable issues rather than personal attacks per se.

Moreover, as the Government points out, effective enforcement of any obligation imposed on licensees in this area may well depend on the availability of sanctions less harsh, and thus more credible, than loss of license, and the Commission may impose such sanctions only where there is willful disregard of its rules. This indicates that an effective right of access for the public cannot be assured unless specific rules, along the lines of the personal attack rules, are set down to cover the field. If, as the Government contends, the rules in question here were necessitated by widespread disregard of this aspect of the overall obligation to afford access to the public on issues of public importance, there is no reason to believe that other and more critical aspects of the obligation were, or will be, followed as long as the present regime is followed.

Finally, as we have pointed out, the entire question of what the Constitution requires of broadcasters is in its infancy. There will be many difficult practical problems to be resolved in developing a meaningful right of access to the airwaves just as there were, and continue to be, many difficult practical problems in adjusting the competing rights of those who would use the streets for communication. Thus far a meaningful attempt to grapple with these issues has

been thwarted by the fact that the Respondents here take the position that the Constitution bars any governmental activity which burdens their right of free speech, even though that activity is on behalf of the free speech interests of the public; while, at times, the Government has appeared to take the equally unsound view that the normal inhibitions of the First Amendment do not bind it in regulating radio and television, *see,* Kalven, *supra,* 10 Journal of Law & Economics 15.

The foregoing suggests, as the Government admits, that the Commission has not yet perfected the rules necessary to implement the public's right of access to the airwaves, and that the necessary improvements will come only after this Court has set down the basic standard which will guide the course of future developments. It also suggests, as the Office of Communication of the United Church of Christ notes, that thus far the Commission has erred on the side of leniency in designing the sanctions which support such a right and make it meaningful; in other words that the Commission far from overreacting to this problem has been overly cautious. Nevertheless, the Commission's Rules can and should be affirmed. As the *Red Lion* case demonstrates the Rules in question contain a basic core of validity that cannot be impeached. Moreover, none of the parties before the Court are challenging the Commission's failure to go far enough fast enough. It is, of course, true that these rules govern speech and that in this area "precision of regulation must be the touchstone," *NAACP* v. *Button, supra,* 371 U. S. at 438, and that even legitimate ends must be "narrowly achieved," *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). But the question of whether these Rules meet those tests can wait for a concrete case. In the interim, the Respondents are simply required to write a letter to the Commission when faced with a questionable situation or to provide minimal amounts of airtime to members of the public. Sanctions for alleged violations of the Commissions Rules are dependent on a showing of willfullness and this requirement of scienter saves the regulations from

Respondent's claim of vagueness, *Screws* v. *United States*, 325 U. S. 91, 102 (1945). Indeed, since the Respondent's fears as to the scope of these Rules may well prove groundless, there is a substantial question as to whether their claims based on vagueness are ripe for adjudication, *cf.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 106-110 (1961). It is instructive to compare the broadcasters situation to that of the petitioners in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). In *Abbott Laboratories*, a 5-3 decision, the majority found that the case was ripe since the regulations were "clear cut," compliance with the order was costly, and failure to comply risked "serious criminal and civil penalties." On the other hand, the main counterpoint was the government's post-litigation representation that only an injunctive remedy would be sought, *Id.* at 151-154. In this setting, the Court felt that it would not be "entangling [itself] in abstract disagreements about administrative policies," by taking jurisdiction *Id.* at 148. Here on the other hand the very point being made by Respondents is that the Rules are not clear cut, compliance with the Rules is not costly, failure to comply does not create the risk of serious penalties, and the Act, not an informal representation is Respondents guarantee. Moreover the Commission has from the first indicated a wililngness to modify the Rules to meet principled objections. In the setting of the instant case reaching the vagueness point would, therefore, lead to the Court entangling itself in an abstract disagreement.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	3
Statement	8
1. The legislative and administrative background	9
A. Early history	9
B. The report on editorializing	14
C. The 1959 amendment to Section 315(a) of the Communications Act	17
D. The Fairness Primer	23
2. The Red Lion proceeding	25
3. The rule making proceeding	33
Summary of argument	37
Argument:	
I. The fairness doctrine underlying the policies and rules here involved constitutionally reflects the public interest in fair access to the medium of broadcasting	41
II. The personal attack rule—like the ruling in *Red Lion*—is a valid exercise of the Commission's regulatory powers and does not offend the First Amendment	58
A. The personal attack rule is a valid exercise of the Commission's responsibility to regulate broadcasting in the public interest	60

Argument—Continued
II. The personal attack rule, etc.—Cont. Page
B. The personal attack rule does not unconstitutionally burden free expression by licensees 66
III. The political editorializing rule is constitutional 78
Conclusion 83

CITATIONS

Cases:

Anti-Defamation League of B'nai B'rith, 4. F.C.C. 2d 190, affirmed, *Anti-Defamation League* v. *Federal Communications Commission*, 403 F. 2d 169, pending on petition for certiorari, No. 960, this Term 62
Associated Press v. *United States*, 326 U.S. 1 52
Banzhaf v. *Federal Communications Commission*, No. 21, 285, decided November 21, 1968, pending on petition for certiorari *sub nom. The Tobacco Institute* v. *Federal Communications Commission*, No. 1036, this Term 46, 55, 56
Burstyn v. *Wilson*, 343 U.S. 495 44
Cantwell v. *Connecticut*, 310 U.S. 296 61
CBS, Inc. (*Lar Daly*), 26 F.C.C. 715, 18 Pike & Fischer R.R. 701 18
Chicago Federation of Labor, 3 F.R.C. Annual Rep., 36, affirmed *sub nom. Chicago Federation of Labor* v. *Federal Radio Commission*, 41 F. 2d 422 12
Connally v. *General Construction Co.*, 269 U.S. 385 73
Farmers Union v. *WDAY*, 360 U.S. 525 ..... 49, 61, 75
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 43

Cases—Continued

	Page
Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U.S. 470	43
Federal Radio Commission v. *Nelson Brothers Co.*, 289 U.S. 266	42
Great Lakes Broadcasting Co., 3 F.R.C. Annual Rep., 32, reversed on other grounds, 37 F. 2d 993, certiorari dismissed, 281 U.S. 706	12
Lawrence W. Harry, 13 F.C.C. 23	13
In re Application of Capitol Broadcasting Company, Inc. (WRAL), 8 F.C.C. 2d 975, 10 Pike & Fisher R.R. 2d 579	64
In re application of Clayton W. Mapoles, 23 Pike & Fisher R.R. 586	63
In re Petition to Revoke License of Springfield Television Broadcasting Corporation (WRLP), 4 Pike & Fisher R.R. 2d 681	64
KFKB Broadcasting Assn. v. *Federal Radio Commission*, 47 F. 2d 670	43
King Broadcasting Co. v. *United States*, No. 21397, C.A.D.C	81
Kovacs v. *Cooper*, 336 U.S. 77	44
Lamont v. *Postmaster General*, 381 U.S. 301	75
Letter to Douglas A. Anello, 25 Pike & Fischer R.R. 1900b	23
Letter to Billings Broadcasting Co., 23 Pike & Fisher R.R. 951	63
Letter to Capital Broadcasting Corporation, Inc., 2 Pike & Fisher R.R. 2d 1104	64
Letter to Garrett Broadcasting, Inc., 1 F.C.C. 2d 929	64
Letter to Grand Canyon Broadcasters, 1 F.C.C. 2d 931	64
Letter to Oren Harris, 3 Pike & Fischer R.R. 2d 163	24

Cases—Continued

	Page
Letter to Mr. Tony Kehl, 1 F.C.C. 2d 936	64
Letter to McBride Industries, Inc., F.C.C. 63–756, July 30, 1963, unreported	64
Letter to Mid-Florida Television Corporation, Inc., F.C.C. 64–863, Sept. 16, 1964, unreported	64
Letter to Radio Albany, Inc. (*WALG*), 4 Pike & Fisher R.R. 2d 277	64
Letter to Richard B. Wheeler, 6 F.C.C. 2d 599	63
Letter to Seminole Broadcasting Co. (*WSWN*), 10 Pike & Fischer R.R. 2d 449	64
Letter to Stations KBHC, KVIN, WJBS, and WNKY, 1 F.C.C. 2d 935	64
Letter to Stations KBEN and WEYY, 1 F.C.C. 2d 933	64
Letter to Susquehanna Broadcasting Co. (*WEDR–FM*), 10 Pike & Fischer R.R. 2d 448	64
Martin v. Struthers, 319 U.S. 141	57
Mayflower Broadcasting Corp., 8 F.C.C. 333	14
McIntire v. *William Penn Broadcasting Co.*, 151 F. 2d 597, certiorari denied, 327 U.S. 779	49
Mills v. *Alabama*, 384 U.S. 214	53, 79
National Broadcasting Co. v. *United States*, 319 U.S. 190, affirming 47 F. Supp. 940	37, 43, 47, 48, 49, 50, 54, 60
New York Times Co. v. *Sullivan*, 376 U.S. 254	39, 55, 61, 74
Noe v. *Federal Communications Commission*, 260 F. 2d 739, certiorari denied, 359 U.S. 924	51
Office of Communication of United Church of Christ v. *Federal Communications Commission*, 359 F. 2d 994	44, 51, 66
Pacifica Foundation, 36 F.C.C. 147	62

Cases—Continued

	Page
Radio Denver, Inc., 5 Pike & Fisher R.R. 570	64
Radio Television News Directors Assn., et al. v. *United States, et al.*, No. 993, 1967 Term (390 U.S. 922)	2
Regents of the University System of Georgia v. *Carroll*, 338 U.S. 586	42
Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246	14, 15, 16, 17, 23, 35, 49, 61, 62
Robert Harold Scott, 3 Pike & Fischer R.R. 259	13
Schneider v. *State*, 308 U.S. 147	57
Smith v. *California*, 361 U.S. 147	75
Speiser v. *Randall*, 357 U.S. 513	75
Star Television, Inc. v. *Federal Communications Commission*, No. 21, 277, C.A.D.C., decided January 30, 1969	48
Staub v. *City of Baxley*, 355 U.S. 313	57
Storer Broadcasting Co., 11 F.C.C. 2d 678	71
Telegrams to Times-Mirror Broadcasting Company, 24 Pike & Fisher R.R. 404, 24 Pike & Fisher R.R. 407	64
Times-Mirror Broadcasting Co., 24 Pike & Fischer R.R. 404	33
United Broadcasting Co., 10 F.C.C. 515	13
United States v. *Associated Press*, 52 F. Supp. 362	55
United States v. *Sullivan*, 332 U.S. 689	78
WBNX Broadcasting Co., 12 F.C.C. 805	13
L. E. White, Jr., 11 F.C.C. 2d 687	73
Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178	13
Constitution, statutes and regulations:	
U.S. Constitution, First Amendment	37, 39, 40, 42, 46, 53, 55, 57, 59, 60, 66, 76, 79, 82
Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*):	
Section 4	3

Constitution, statutes and regulations—Cont.
Communications Act of 1934, etc.—Cont.
Page
Section 301 ..... 42, 49
Section 303 ..... 3, 66
Section 303(g) 66
Section 303(r) 4
Section 307(a) 42
Section 308(b) 66
Section 309(a) 42
Section 310(b) 42
Section 315 ..... 4, 12, 37, 41, 66, 67, 82
Section 315(a) 4, 17, 21, 41, 61, 66, 67, 68, 70
Section 315(b) 5
Section 315(c) 5, 66
Section 503(b) 5, 34, 65, 74
Radio Act of 1912 (37 Stat. 302) 10
Radio Act of 1927 (44 Stat. 1162, *et seq.*), Section 18 ..... 10, 12
73 Stat. 557 18
47 C.F.R. § 73.123 6
47 C.F.R. § 73.300 6
47 C.F.R. § 73.598 6
47 C.F.R. § 73.679 6
Miscellaneous:
"Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (Fairness Primer), 29 Fed. Reg. 10415 ..... 23, 24
Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967) 56
Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447 (1968) 56, 57, 72

Miscellaneous—Continued

Page

Chafee, *Government and Mass Communications* (1947), Vol. II 50
Report on Frequency Management within the Executive Branch of the Government, October, 1966 47
Fairness Primer, 29 Fed. Reg. 10415, (1964) 23, 24
6 F.C.C. Annual Rep. 55 13
H.R. 7716, 72d Cong., 2d Sess. (1932) 13
H.R. 7985, 86th Cong., 1st Sess. (1959) 21
H.R. 9971, 69th Cong. 10
H. Rep. No. 2106, 72d Cong., 2d Sess. (1933) 13
H. Rep. No. 1069, 86th Cong., 1st Sess. (1959) 21, 22
Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess. (1963) 25
Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess. (1930) 11
Hearings before the Senate Subcommittee on Communications of the Committee on Commerce on S. 251, S. 252, S. 1696 and H.J. Res. 247, 88th Cong., 1st Sess. (1963) 25
Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. Res. 94, 84th Cong., 2d Sess. (19) 53
Memorandum Opinion and Order, 32 Fed. Reg. 10303 34
Memorandum Opinion and Order, 32 Fed. Reg. 11531 35
Memorandum Opinion and Order, 33 Fed. Reg. 5362 36

Miscellaneous—Continued

	Page
Note, *Regulation of Program Content by the F.C.C.*, 77 Harv. L. Rev. 701 (1964)	56
Notice of Proposed Rule Making, 31 Fed. Reg. 5710	33
11 Pike & Fischer R.R. 2d 628	81
Public Notice of July 25, 1963 (25 Pike & Fischer R.R. 1899)	23
S. 2424, 86th Cong., 1st Sess. (1959)	18, 19
S. Rep. No. 772, 69th Cong., 1st Sess. (1926)	10
S. Rep. No. 1045, 72d Cong., 2d Sess. (1933)	13
S. Rep. No. 562, 86th Cong., 1st Sess. (1959)	18, 19
Staff Report of Senate Subcommittee of the Committee on Commerce, 90th Cong., 2d Sess., Report on Communications (Comm. Print 1968)	71
67 Cong. Rec. 12501–12505	10
67 Cong. Rec. 12503	10
67 Cong. Rec. 12504	11
76 Cong. Rec. 3768	13
105 Cong. Rec. 14440	19
105 Cong. Rec. 14457	20, 21
105 Cong. Rec. 14462	21
105 Cong. Rec. 16260	21
105 Cong. Rec. 16375	21
105 Cong. Rec. 16588	21
105 Cong. Rec. 17778	21
105 Cong. Rec. 17782	21
105 Cong. Rec. 17830	21
105 Cong. Rec. 17831	22
105 Cong. Rec. 17832	21
30 Fed. Reg. 168	48
32 Fed. Reg. 3305	48
32 Fed. Reg. 9815	48
33 Fed. Reg. 12591	48

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 2

RED LION BROADCASTING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinions of the District of Columbia Circuit in No. 2 (A., No. 2, 91–132) are reported at 381 F. 2d

908. The opinion of the Seventh Circuit in No. 717 (A., No. 717, 344a–373a) is not yet reported.

JURISDICTION

The judgment of the court of appeals in No. 2 was entered on June 13, 1967. The petition for a writ of certiorari was filed on September 11, 1967, and was granted December 4, 1967 (389 U.S. 968).

The judgment of the court of appeals in No. 717 was entered on September 10, 1968. The petition for a writ of certiorari was filed on November 7, 1968, and was granted on January 13, 1969.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).[1]

QUESTIONS PRESENTED

The Federal Communications Commission has adopted rules codifying its policy requiring broadcast licensees to afford an opportunity for reply to any person subjected to a personal attack in connection with the discussion of a controversial issue of public importance and to any political candidate against whom the licensee has editorialized.

---

[1] On January 29, 1968, after certiorari had been granted in No. 2, the Court denied certiorari before judgment in the case that is now No. 717, *Radio Television News Directors Assn., et al.* v. *United States, et al.*, No. 993, 1967 Term (390 U.S. 922). However, on the same date the Court entered an order in No. 2 (then No. 600, 1967 Term) postponing oral argument in that case pending decision of the Seventh Circuit in *Radio Television News Directors Assn.* and this Court's action on any petition for certiorari which might be filed seeking review of that decision (390 U.S. 916).

The question presented by No. 2 is whether the personal attack policy, as applied in an *ad hoc* ruling on a specific situation prior to adoption of the rules, is consistent with the First Amendment.

The question presented by No. 717 is whether the rules and the policies related thereto are consistent with the First Amendment.

STATUTES AND REGULATIONS INVOLVED

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), are as follows:

SEC. 4 (47 U.S.C. 154):

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

* * * * *

SEC. 303 (47 U.S.C. 303):

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 315 (47 U.S.C. 315):

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bone fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be con-

strued as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

SEC. 503 (47 U.S.C. 503):

* * * * *

(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

(C) fails to observe any final cease and desist order issued by the Commission,

(D) violates section 317(c) or section 509(a)(4) of this Act, or

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to

exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach unless a written notice of apparent liability shall have been issued by the Commission and such notice has been received by the licensee or permittee or the Commission shall have sent such notice by registered or certified mail to the last known address of the licensee or permittee. A licensee or permittee so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulations prescribe, why he should not be held liable. A notice issued under this paragraph shall not be valid unless it sets forth the date, facts, and nature of the act or omission with which the licensee or permittee is charged and specifically identifies the particular provision or provisions of the law, rule, or regulation or the license, permit, or cease and desist order involved.

(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability and in no event shall the forfeiture imposed for the acts or omissions set forth in any notice of apparent liability exceed $10,000.

2. The regulations under review in No. 717 appear in identical texts as §§ 73.123, 73.300, 73.598 and 73.679 of the Commission's rules and regulations (governing, in each case, a different class of broadcast station). The text is as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee.)

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed.

Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

STATEMENT

These cases involve the constitutional validity of aspects of the Federal Communications Commission's Fairness Doctrine, *viz.*, the policies and rules relating to personal attacks and political editorializing. The Fairness Doctrine is based upon the public's right to be informed on public issues. It is designed to insure that conflicting views on controversial issues of public importance have access to the broadcasting medium. The personal attack policy, as one aspect of this basic principle, requires that a station which carries an attack upon a person or group during the presentation

of views on a controversial public issue implement the public's right to hear the other side by advising the person or group attacked of the attack and offering a reasonable opportunity to respond.

That policy was the basis for the Commission ruling under review in No. 2 and, with limited refinements, is embodied in subsequent regulations under review in No. 717. Similarly, the political editorializing requirement, also included in the regulations, requires the offer of a reasonable opportunity to respond to licensee editorials supporting or opposing a particular candidate during political campaigns.

No. 2 (hereinafter *Red Lion*) involves a challenge to a 1965 Commission order directing Red Lion Broadcasting Co., Inc., licensee of radio station WGCB in Red Lion, Pennsylvania, to afford time to Fred J. Cook to respond to an attack against him in a broadcast by Reverend Billy James Hargis. No. 717 (hereinafter *RTNDA*) involves a general challenge to the constitutionality of the personal attack and editorializing rules adopted by the Commission in 1967 and amended in 1967 and 1968.

1. THE LEGISLATIVE AND ADMINISTRATIVE BACKGROUND

Since the rules and related policies in issue are particularized aspects of the Fairness Doctrine, initial consideration of the development of that principle as an expression of the obligation of broadcasters to operate under their licenses in the public interest will assist in placing the issues in these cases in perspective.

A. *Early History.* The first statute dealing specifically with broadcasting was the Radio Act of 1927

(44 Stat. 1162).[2] The direct predecessor of the Communications Act of 1934, it created the Federal Radio Commission and authorized that agency to license and regulate all uses of radio.

In reporting out H.R. 9971, the bill enacted as the Radio Act of 1927, the Senate Committee on Interstate Commerce added a provision to the House bill which would have made broadcast stations common carriers as to "any question affecting the public" for the discussion of which the licensee permitted the station to be used (S. Rep. No. 772, 69th Cong., 1st Sess., p. 4 (1926)). However, the requirement was not considered workable, since a station would have had to give time to anyone who presented himself, and Senator Dill, the Committee chairman, offered an amendment on the floor of the Senate to limit the provision to candidates for public office (67 Cong. Rec. 12501–12505).[3] As somewhat revised, this amendment became Section 18 of the Radio Act of 1927 (44 Stat. 1170), which provided:

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[2] The Radio Act of 1912 (37 Stat. 302), the first statute to require a license for the use of radio, did not refer to broadcasting.

[3] Senator Howell objected to the change because, "to perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue" (67 Cong. Rec. 12503).

Senator Dill responded, "I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words 'public questions' in the bill.

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but

If any licensee shall permit any person who is a legally qualified candidate for any public office

that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

"As I say, I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time, but to await developments, and get this organization to functioning, and the bill can be amended in the future.

"I just wanted to leave that idea with the Senator as to my reasons for taking the view I do" (67 Cong. Rec. 12504).

Senator Dill subsequently made clear that his amendment was not intended to prevent the Commission from making rules to require that both sides of a controversy be heard. The following colloquy occurred at hearings held in 1930:

Commissioner Robinson. Let us go farther and say that one of the stations in Washington, WMAL, would to-night put on a forceful speech against labor, making a strong argument against labor, labor organizations. Ought not labor to have the opportunity to reply with equal facility? If denied, how about equal opportunity for freedom of speech? It is, after all, merely an enlargement of this natural transmitter. I am using a frequency from my transmitter to your receiving set now.

Senator Dill. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

Commissioner Robinson. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, "I am entitled to this opportunity," and he will get it.

Senator Dill. Has the commission considered the question of making regulations requiring stations to do that?

Commissioner Robinson. Oh, no.

Senator Dill. It would be within the power of the commission, I think, to make regulations on that subject. [Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., p. 1616 (1930).]

> to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Soon after its establishment, the Federal Radio Commission adopted as its own policy under the new statute the principle that

> * * * it would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public. [*Great Lakes Broadcasting Co.*, 3 F.R.C. Annual Rep. 32, 33 (1929), reversed on other grounds, 37 F. 2d 993 (C.A.D.C.), certiorari dismissed, 281 U.S. 706.]

See also *Chicago Federation of Labor,* 3 F.R.C. Annual Rep. 36 (1929), affirmed *sub nom. Chicago Federation of Labor* v. *Federal Radio Commission,* 41 F. 2d 422 (C.A.D.C.).

Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934 without

change (48 Stat. 1088).[4] The newly created Federal Communications Commission continued its predecessor agency's policy on fairness in broadcasting. In *Young People's Association for the Propagation of the Gospel,* 6 F.C.C. 178 (1938), the Commission denied an application for a construction permit primarily because of the applicant's policy of refusing to permit the use of its broadcast facilities by persons or organizations wishing to present any viewpoint different from that of the applicant. Again in 1940, the Commission stated: "In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions" (6 F.C.C. Annual Rep. 55 (1940)). During the succeeding years, the Commission continued to apply the fairness principle on an *ad hoc* basis in individual cases (see, *e.g., United Broadcasting Co.,* 10 F.C.C. 515 (1945); *Robert Harold Scott,* 3 Pike & Fischer R.R. 259 (1946); *WBNX Broadcasting Co.,* 12 F.C.C. 805 (1948); *Laurence W. Harry,* 13 F.C.C. 23 (1948).

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[4] Earlier proposed legislation, H.R. 7716, 72d Cong., 2d Sess. (1932), would have required "equal opportunities" not only for candidates for public office, but also for persons using a station "in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election" (S. Rep. No. 1045, 72d Cong., 2d Sess., pp. 8, 11 (1933); 76 Cong. Rec. 3768). The bill also provided that "it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions" (H. Rep. No. 2106, 72d Cong., 2d Sess., p. 4 (1933)). This bill was pocket vetoed, however, and accordingly never became law.

B. *The Report on Editorializing.* In 1940, the Commission had declared in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339, that "the broadcaster cannot be an advocate," and that opinion was generally construed as a prohibition of broadcast editorializing. In 1947, the Commission deemed it desirable to reexamine the questions of editorializing and, in general, the "obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion * * *" (13 F.C.C. at 1246), and accordingly held extensive public hearings, which culminated in the *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949) (hereinafter *Report on Editorializing*). This report includes the fullest single exposition of the Fairness Doctrine.

In the *Report on Editorializing,* the Commission determined that licensees should be free to editorialize, and at the same time reemphasized that a basic element of operation in the public interest "is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (13 F.C.C. at 1248). Consequently, in the "presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise" (13 F.C.C. at 1250).

Basic to the Commission's position there stated was its view that broadcasters operate their facilities as a public trust under the public interest standard

of the Communications Act (see 47 U.S.C. 307(a), 309), and that the public interest could not be served by a licensee who made radio unavailable as a medium of free speech (13 F.C.C. at 1247–1248). In elucidating this notion so central to the instant controversy, the Commission stated (13 F.C.C. at 1249):

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed,

rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

In rejecting any assertions that action to further this right would contravene the First Amendment, the Commission stated (13 F.C.C. at 1256–1257):

> * * * We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgement by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment.
>
> * * * * *
>
> We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the first amendment. *United States* v. *Paramount Pictures, Inc., et al.*, 334 U.S. 131, 166. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full

> effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. * * *

Thus, the Commission stated as its policy that licensees have a general obligation (1) to devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance, and (2) in doing so, to be fair—that is, affirmatively to endeavor to make their facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented (13 F.C.C. at 1249–1252). While affirming the licensee's general discretion in determining the issues to be covered, the shades of opinion to be presented, the appropriate spokesmen, and the amount of time to be afforded (13 F.C.C. at 1251), the Commission clearly indicated that the "personal attack" situation might give rise to a more specific obligation (13 F.C.C. at 1252).

C. The 1959 Amendment to Section 315(a) of the Communications Act. In 1959, some ten years later, Congress amended Section 315(a) of the Federal Communications Act (47 U.S.C. 315(a)) to exempt from the "equal time" requirement for political candidates the appearance by a legally qualified candidate on any bona fide newscast, bona fide news interview, bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or on-

the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto) (73 Stat. 557)[5]. However, it further provided in the amending language that:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The Senate bill, as reported out of committee, had not contained the sentence quoted above.[6] The views of the Senate Interstate and Foreign Commerce Committee were, however, set forth in the report accompanying the bill as follows (S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8–9 (1959)):

> The equal time provision of section 315(a) was designed to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station in selling or donating time or in scheduling political broadcast. If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the

[5] This amendment was made in response to the Commission's ruling in *CBS, Inc. (Lar Daly)*, 26 F.C.C. 715, 18 Pike & Fischer R.R. 701 (1959) that a political candidate's appearance on a newscast gave other candidates an "equal opportunity" to use the station's facilities.

[6] S. 2424, 86th Cong., 1st Sess. (1959).

> present provision regarding equal time and urge the right of each broadcaster to follow his own conscience in the presentation of candidates on the air. However, *broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.* Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias. [Emphasis added.]

The Committee report, to prevent any misunderstanding as to the possible effect of the proposed legislation on the Fairness Doctrine, went on to state (*id.* at 13);

> In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy.

Senator Pastore, Chairman of the Senate Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, and a manager of the bill, reiterated the views of the Committee in introducing the bill on the floor of the Senate:

> * * * Under existing law and policy it is absolutely mandatory that they [broadcasters] shall serve the public interest because these media are in the public domain, and therefore they should be fair in their treatment in all events. [105 Cong. Rec. 14440.]

Senator Proxmire offered an amendment to assure that all viewpoints in public controversies would be presented, and the following colloquy ensued:[7]

> Mr. PASTORE. What the Senator from Wisconsin is doing, as I understand, is appending to the amendment a statement of the philosophy that these media are in the public domain, and that where it is practically possible all sides shall be given a fair opportunity of exposure to the public.
>
> Mr. PROXMIRE. The Senator is correct.
>
> Mr. PASTORE. But it in no way infringes upon the exceptions which we have spelled out?
>
> Mr. PROXMIRE. The Senator is correct
>
> * * * * *
>
> Mr. DOUGLAS. I congratulate the Senator from Wisconsin for his amendment. As I see it, the wording of the amendment puts into the act the declaration which the committee itself made on page 13 of its report, but it reinforces that declaration by making it a part of the statute, and hence binding, whereas the report is merely of a persuasive nature but is not controlling.
>
> Mr. PROXMIRE. The Senator is exactly correct. The purpose is the same as expressed

[7] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given an equal opportunity to be heard as is practically possible." (105 Cong. Rec. 14457.)

> on page 13 of the committee report and is for the purpose which the Senator from Illinois has expressed it. [105 Cong. Rec. 14457.]

Senator Pastore accepted the amendment with the following comment:

> Mr. PASTORE. Mr. President, I understand the amendment to be a statement or codification of the standards of fairness. I understand that the Commission is now obliged by existing law and policy to abide by the standards of fairness.
>
> I repeat that I consider the amendment to be rather surplusage; but I shall accept the amendment and shall take it to conference, if it means to emphasize the objective which all of us desire to accomplish. [105 Cong. Rec. 14462.]

In the House of Representatives another bill on the the same subject was passed,[8] and because of differences between the House and Senate versions, a Conference Committee was appointed.[9] In the conference, the Proxmire amendment was modified to read as the last sentence of Section 315(a) now appears (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1959)). This modification was accepted by both the House[10] and the Senate.[11]

In the Senate discussion of the Conference Committee report, Senator Pastore emphasized the importance of the Proxmire amendment by stating (105 Cong. Rec. 17830):

> We insisted that the provision remain in the bill, to be a continuing reminder and admoni-

[8] H.R. 7985, 86th Cong., 1st Sess. (1959).
[9] 105 Cong. Rec. 16260, 16375, 16588.
[10] 105 Cong. Rec. 17778, 17782.
[11] 105 Cong. Rec. 17832.

> tion to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country.

Senator Scott, one of the managers on the part of the Senate, elaborated on these remarks as follows (105 Cong. Rec. 17831):

> * * * We have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out what I do not think has yet been explained, that the phrase "To afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. *It is intended to encompass all legitimate areas of public importance which are controversial,* and there are many, as we know, which pertain to medicine, to education, and to other areas than political discussion, and *it is intended that no one point of view shall gain control over the airwaves to the exclusion of another legitimate point of view.* [Emphasis added.]

In sum, as the Conference report made clear, the Proxmire amendment was a congressional "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1959)).

D. *The Fairness Primer.* After the Fairness Doctrine had thus been expressly sanctioned and approved by Congress, the Commission continued to enforce and give content to the principle in individual cases. As the cases developed, the Commission considered further the personal attack problem which it had first called to the attention of broadcasters in the *Report on Editorializing* (see *supra,* p. 17). A Public Notice mailed to all licensees on July 25, 1963 (25 Pike & Fischer R.R. 1899), reminded broadcasters of their duty to comply with the Fairness Doctrine generally, and called particular attention to past cases specifying requirements for compliance when personal attacks had been broadcast (*id.* at 1900):

> (a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (*Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586, 591; *Billings Broadcasting Company,* 23 Pike & Fischer, R.R. 951, 953).

The Public Notice also indicated that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, might be appropriate to delineate more explicitly a licensee's responsibilities regarding fairness. See also *Letter to Douglas A. Anello,* 25 Pike & Fischer R.R. 1900b, 1900d (1963). The resulting study culminated in a Public Notice known as the Fairness Primer (29 Fed. Reg.

10415 (1964)),[12] which collected all previous Fairness Doctrine rulings having substantive content. Although the Commission had earlier defined and elaborated on its procedures for handling fairness complaints (*Letter to Oren Harris,* 3 Pike & Fischer R.R. 2d 163 (1963)), the Commission expected that by compiling and categorizing its rulings and making them a matter of public record, it might reduce the number of complaints of alleged unfairness and of violations as well (29 Fed. Reg. at 10416).

The Fairness Primer contained a section specifically devoted to the personal attack aspect of the Doctrine. It made clear, *inter alia,* the following salient points (29 Fed. Reg. at 10420–10421):

(1) When an attack is made on an individual's or group's integrity, character, honesty, or like personal qualities, in connection with a controversial issue of public importance, the licensee has an affirmative duty to take all appropriate steps to see to it that the person or persons attacked are afforded the fullest opportunity to respond. The licensee cannot avoid responsibility because of his lack of involvement in the personal attack since, with the exception of the equal opportunities provision of Section 315, a licensee is fully responsible for all matter which is broadcast over his station.

(2) Where a personal attack is broadcast, a licensee has an obligation to send a transcript or tape of the

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[12] The full title of the Fairness Primer, which focused directly on its purpose and content, was "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (29 Fed. Reg. 10415).

program to the person attacked. Where no script or tape is available, the licensee must send as accurate a summary as possible.

Accordingly, the basic operating precepts of the personal attack aspect of the Fairness Doctrine had been established through an evolutionary process involving *ad hoc* decisions in specific cases, and these principles had been publicly promulgated, when the *Red Lion* case arose.[13]

2. THE RED LION PROCEEDING

On November 27, 1964, Station WGCB in Red Lion, Pennsylvania (hereinafter "Red Lion") carried a broadcast by Reverend Billy James Hargis on the

[13] Congress was informed on several occasions of the Commission's policies in the personal attack area. See Hearings before the Senate Subcommittee on Communications of the Committee on Commerce on S. 251, S. 252, S. 1696 and H.J. Res. 247, 88th Cong., 1st Sess., pp. 97–98 (1963) (hereinafter 1963 Senate Hearings on S. 251); Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess., pp. 88–89, 140–141, 156–166 (1963) (hereinafter 1963 House Hearings on Broadcast Editorializing). In testimony before the Senate Subcommittee, then Commission Chairman Henry indicated that in the personal attack area the Commission might "want to come up with a primer as we have done under 315, and set out a series of examples of past cases we have handled in the field of editorializing. We may want to issue a new policy statement or adopt some rules or some combination of all of those" (1963 Senate Hearings on S. 251, p. 67; see also 1963 House Hearings on Broadcast Editorializing, p. 89). Senator Pastore, Chairman of the Subcommittee, stated that he thought "the rule idea is a good idea," and hoped that, "the Commission would get into this immediately" (1963 Senate Hearings on S. 251, p. 68).

834-176—69——3

"Christian Crusade" program. The program included a discussion of the 1964 presidential election and a book about the Republican campaign, "Goldwater—Extremist On The Right," written by Mr. Fred J. Cook (A., No. 2, 9, 61–62): During the course of the program, Hargis made the following statements about Cook (A., No. 2, 61–62):

> Now, this paperback book by Fred J. Cook is entitled, "GOLDWATER—EXTREMIST ON THE RIGHT." Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies * * *. Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing * * * there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency * * * now this is the man who wrote the book to smear and destroy Barry

Goldwater called "Barry Goldwater—Extremist Of The Right".

Upon learning of this syndicated broadcast, Cook wrote a letter to Red Lion asking whether WGCB had broadcast the above remarks by Hargis and, if so, requesting time to reply at the station's expense (A., No. 2, 33–34). Red Lion responded by merely supplying Cook with copies of letters it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union and a copy of its rate card, with the suggestion that Cook notify the station concerning the time he might wish to purchase (A., No. 2, 34–35). By letter dated December 31, 1964, Cook repeated his inquiry whether the station had in fact carried the broadcast by Hargis (A., No. 2, 35–36). To this last letter Red Lion answered (A., No. 2, 36–37):

> Regarding your letter of December 31, 1964, we [are] at a loss to understand your statement that may imply that we ought *not* to "drum-up business"—we could ask, "How else may we be expected to stay in business?"
>
> Your suggestion that we grant you "free time" for a brief reply, prompts me to ask what would happen if General Motors advertised the "best car" and Ford then demanded "free time" to inform our listeners that they had been slandered. This would soon remove all broadcasting from the realm of free enterprise, leaving only government subsidized and controlled radio. I am sure Mr. Cook, that you would not wish this to happen.

> For your information, it was your article on "The Hate Club of the Air" which alerted us to several of these broadcasts which we later acquired, so that now we carry them all. Your article has resulted in cutting our deficit spending by almost one half, thus the harm that was intended has greatly benefited us.
>
> As to the tape in question, we have run the tapes that we have received from Dr. Hargis. We doubt that he has discriminated against our Station in this instance.

On February 7, 1965, Cook filed a complaint with the Commission (A., No. 2, 26–29), alleging that Red Lion had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. In addition, he alleged that the station was insisting upon payment for any reply broadcast.[14]

The Commission brought the complaint to the attention of Red Lion and requested an answer within twenty days (A., No. 2, 31). By letter dated May 19, 1965, Red Lion admitted carrying the broadcast by Hargis on WGCB (A., No. 2, 32–33). It urged, however, that free time should be necessary only if paid

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[14] Cook's letter listed 15 other stations that had acknowledged carrying the same broadcast but similarly refused free reply time. It went on to report that, "Of all of the stations carrying the Rev. Billy James Hargis' attack against me, just one, KXEN, in St. Louis, notified me of his remarks and sent me a transcript of them as the rule requires. I have since learned through correspondence with one of the stations that the Rev. Carl McIntire made a similar attack upon me last fall over his network of several hundred stations, none of whom notified me of this. As a result, I still do not know what he said, and it is now too late to counter it" (A., No. 2, 26–27).

sponsorship was unavailable, and that its inquiries to Cook were directed toward ascertaining whether he was prepared to obtain a sponsor or was willing to pay for the reply broadcast, concluding (A., No. 2, 33):

> The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

By letter dated October 6, 1965, the Commission rejected Red Lion's contentions (A., No. 2, 37–40). It stated its policy that when a personal attack was broadcast a licensee was obligated to inform the person involved of the attack, to send him a tape or transcript of the broadcast, and to offer him a comparable opportunity to respond. The Commission found that the broadcast had involved a personal attack on Cook and that Red Lion had violated the Fairness Doctrine by not complying with these requirements. With respect to payment for reply time, the Commission stated (A., No. 2, 39):

> The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was

not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

On November 8, 1965, Red Lion requested reconsideration of the Commission's ruling (A., No. 2, 40–43). It argued that the broadcast by Hargis was a response to the article by Cook in *The Nation,* and that fairness did not require a further answer by Cook over WGCB. It reiterated its view that the personal attack facet of the Fairness Doctrine should not require an offer of free time unless the person attacked was unable to pay for the reply. It asked that the Commission clarify, by way of declaratory ruling, the scope of its directive of October 6, and requested a Commission determination of the constitutionality of the Fairness Doctrine as applied to the situation involved.

By letter dated December 9, 1965, the Commission indicated to Red Lion that it adhered to its prior ruling (A., No. 2, 44–49). It rejected Red Lion's argument that the policy on personal attacks was satisfied by an examination of what other media had said on a particular issue. It held that the policy "deals solely with

the particular station and what it has broadcast on the controversial issue of public importance" (A., No. 2, 45). Moreover, the Commission again rejected Red Lion's contention that Cook's financial ability to pay was a relevant consideration. To its previous discussion, it added (A., No. 2, 46):

> There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, reasonable opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

Finally, the Commission adhered to its position on the constitutionality of the Fairness Doctrine taken in the *Report on Editorializing*. It summed up the basis of its ruling as follows (A., No. 2, 48–49):

> The ruling provides that if sponsorship is not forthcoming * * * the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that

other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities."

On petition for review by Red Lion, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Tamm (Judge Fahy concurring and Judge Miller not participating), affirmed the Commission's order (A., No. 2, 91–132).[15]

Judge Tamm reviewed the background of the Fairness Doctrine, with particular attention to the personal attack facet thereof, and carefully canvassed the issues presented for decision. He held that the statute contained a permissible and adequately precise delegation of power to the Commission (A., No. 2, 112–117), that neither the Fairness Doctrine generally nor the personal attack aspect thereof was unconstitutionally vague (A., No. 2, 117–122), and that no denial of the right of free speech resulted from their application (A., No. 2, 122–131). Judge Fahy concurred in the result reached by Judge Tamm and in general with his reasoning, without, however, joining in all of the details of the opinion (A., No. 2, 132).

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[15] Previously, the panel had dismissed the petition on the ground that the Commission's ruling was not reviewable, Judge Fahy dissenting (A., No. 2, 82–89). On petition for rehearing *en banc* joined in by all parties, the court of appeals vacated the judgment of dismissal and directed that the case be considered on the merits (A., No. 2, 90).

3. THE RULE MAKING PROCEEDING

On April 6, 1966, shortly after its Red Lion ruling, the Commission issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710 (A., No. 717, 3a–8a) looking toward a codification of its policies on personal attacks and editorializing on political candidates. After reviewing the interpretative rulings on personal attacks set forth in the Fairness Primer, the Commission noted that "the procedures specified have not always been followed even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue" (A., No. 717, 4a.) The Commission stated that a codification of its policy would serve to "emphasize and make more precise licensee obligation in this important area," and would "assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed" (*ibid.*).

The Notice also proposed a rule to implement the Commission's decision in *Times-Mirror Broadcasting Co.*, 24 Pike & Fischer R. R. 404 (1962), with respect to political editorials. The Commission noted that between 1960 and 1964 the number of radio and television stations carrying political editorials had increased, respectively, from 53 and 2 to 103 and 13 (A., No. 717, 6a, n. 3), and that there was "some indication of failure to comply with the corresponding obligation" to afford time to disfavored candidates to answer such editorials (A., No. 717, 6a). The proposed rule was designed to insure that the appropriate candidate be informed of the station's editorial opposing

his candidacy or supporting a rival's, and be given a reasonable opportunity to respond (A., No. 717, 6a–7a).

Written comments in support of and in opposition to the proposed rules were submitted by respondents in the *RTNDA* case, a number of other broadcast licensees, and other interested parties (see A., No. 717, 9a–208a). On July 5, 1967, the Commission issued a Memorandum Opinion and Order adopting the rules substantially as proposed, 32 Fed. Reg. 10303 (A., No. 717, 209a–222a). The Commission reiterated that the new rules did not alter the substance of the previous personal attack and editorializing policies (A., No. 717, 212a–213a); it stated that codification was intended simply to clarify the obligations of licensees and to empower the Commission to impose forfeitures under Section 503(b) of the Act (47 U.S.C. 503(b)) in cases of clear violations which would not warrant the drastic sanction of revocation or nonrenewal of license, but required more than a letter of reprimand (A., No. 717, 210a). Recognizing that situations might arise in which the application of the personal attack rule could entail some uncertainty, the Commission stressed that sanctions would not be imposed where only differences in judgment were involved. It stated that the personal attack rule was expressly directed only toward situations of failure to comply with the prescribed requirements where "there can be no reasonable doubt under the facts that a personal attack has taken place" (A., No. 717, 215a–216a), and noted that the sanctions available under Section 503(b) are

by their terms applicable only to willful or repeated violations of Commission rules (A., No. 717, 210a).

The Commission considered but rejected the contention that the rules would discourage controversial programming. Rather, it pointed out, the rules were intended to implement the Fairness Doctrine's purpose of encouraging controversial programming by insuring that more than one viewpoint on issues of public importance would be heard. The only discouragement to controversial programming would be for a "licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked" (A., No. 717, 216a). As to the claim that the rules resulted in unconstitutional infringements of the rights of free speech and a free press, it noted that the purpose was instead to foster and further robust debate of public issues, citing its discussion in the *Report on Editorializing* and the *Red Lion* decision (A., No. 717, 211a–212a).

Subsequent to adoption, the personal attack rule has been amended twice. On August 7, 1967, the Commission issued a supplementary Memorandum Opinion and Order, 32 Fed. Reg. 11531 (A., No. 717, 223a–227a), exempting bona fide newscasts and on-the-spot coverage of bona fide news events from the ambit of the rule. The Commission took account of the general practice of presenting the reply to a personal attack made in a newscast in the same or a later newscast, and believed that a specific reply requirement in these areas might have a disruptive effect upon the effective execution of the important news functions of licensees and networks (A., No. 717, 223a–224a). Subsequent to the institution of the actions below, and with the per-

mission of the court of appeals, the Commission amended the rule further to exempt bona fide news interviews and commentary or analysis in the course of bona fide newscasts (A., 717, 231a), in another Memorandum Opinion and Order, 33 Fed. Reg. 5362 (A., No. 717, 228a–234a). It did so to avoid any possibility, however speculative, of inhibition in these important areas of broadcast journalism, in accord with the similar congressional policy with respect to equal time for political candidates expressed in Section 315 of the Act (A., No. 717, 233a).

The Court of Appeals for the Seventh Circuit held [16] that the rules unreasonably restrict free speech, and set aside the Commission's order adopting them. It held that the requirements of notice and opportunity for reply imposed excessive economic and practical burdens on the broadcasting of views on controversial issues of public importance and on political editorializing by licensees. In the court's view, these requirements, together with "the omnipresent threat of suffering severe and immediate penalties" for violation of the rules, would lead to licensee self-censorship (A., No. 717, 359a). The court of appeals found "[a]n even greater threat of Commission censorship" in

[16] The new rules were the subject of three separate petitions for review below, in Case No. 16369 by Radio Television News Directors Association, et al. (A., No. 717, 264a–269a), in Case No. 16498 by Columbia Broadcasting System, Inc. (A., No. 717, 270a–277a), and in Case No. 16499 by National Broadcasting Company, Inc. (A., No. 717, 284a–289a). The latter two petitions were transferred from the Second Circuit pursuant to 28 U.S.C. 2112, and the cases were consolidated in the Seventh Circuit by order of October 24, 1967.

what it considered insufficient specificity as to when the obligation of notice and opportunity for reply arises, compelling licensees to consult the Commission to determine their obligation in borderline cases (A., No. 717, 360a). The court declined to recognize any distinction between the broadcast press and the printed press with respect to the obligations that might be imposed on the former by the Commission. In view of its decision on the First Amendment question, the court did not reach the question whether Congress had authorized the Commission to promulgate such rules (A., No. 717, 371a).

SUMMARY OF ARGUMENT

Unlike other media of expression, broadcasting is "inherently not available to all" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226). Because of this unique characteristic, and since broadcasters utilize the public airwaves, radio has long been subjected to governmental regulation in the public interest. One important aspect of this regulation has involved the development by the Federal Communications Commission of the so-called Fairness Doctrine, under which broadcast licensees are required to present opposing views on public issues. That doctrine received explicit congressional sanction in 1959 when, in amending Section 315 of the Communications Act, Congress confirmed the broadcasters' obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The same considerations which have supported this

Court's previous rejections of First Amendment challenges to Commission regulation of broadcasting remain viable and support the Fairness Doctrine. Until the Seventh Circuit's decision in *RTNDA*, no court had suggested that the First Amendment was violated by Commission action to insure the preservation of broadcasting as a medium open to full debate on public issues. Nor is it enough, particularly as to broadcasting, to leave the matter of airing opposing views on important questions simply to the "marketplace of ideas." That marketplace is increasingly one for the affluent and powerful. It is essentially to effectuate a right of access to the broadcasting medium to serve the public interest in hearing both sides of public issues that the Fairness Doctrine was evolved by the Commission. That doctrine, as a general principle, is plainly within the Commission's statutory authority. Moreover, it suffers from no constitutional infirmity, but rather seeks affirmatively to foster the public interest in free and robust debate of significant issues which is central to the First Amendment.

Both the personal attack and political editorializing rules involved in *RTNDA* seek to implement the Fairness Doctrine. Prior to the adoption of the formal rules, the Commission had applied a personal attack policy on an *ad hoc* basis in individual cases of which *Red Lion* is an example. The essential elements of that policy—giving notice of an attack, providing a tape

or script, and offering reply time—were set out in the so-called Fairness Primer published by the Commission in 1964, and were simply codified in the new rule. That policy was properly upheld by the D.C. Circuit in *Red Lion*, and incorrectly invalidated by the Seventh Circuit in *RTNDA*. Neither the rule nor the previous policy have been shown to be unduly burdensome for broadcast licensees or to result in the inhibition of speech. Nor are the requirements of the rule so imprecise or vague as to be vulnerable to constitutional challenge. The added sanctions available to the Commission under the rule do not render it invalid, but simply give the Commission a more credible and effective mechanism for effectuating the underlying policy. The personal attack rule is directed in any event at a narrow class of cases—attacks on individuals or groups occurring "during the presentation of views on a controversial issue of public importance." Certain classes of news programs have been specifically exempted from the rule's coverage, to alleviate any possible concern that interference with such programming might result. And the Commission has made it clear that sanctions will be imposed only for willful or repeated violations of the rule.

Contrary to the suggestion of the court of appeals in *RTNDA*, nothing in this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, requires invalidation of the personal attack rule on First Amendment grounds. *New York Times* and its prog-

eny are in any event not directly relevant, since the basic thrust of the rule is to protect the public's access to conflicting views on public issues, not to penalize the broadcaster or to provide private redress such as that provided for by libel laws. If anything, these cases support the Commission's action here.

The Seventh Circuit acted improperly in striking down the rule on its face, since in doing so it effectively substituted its judgment for that of the agency charged by Congress with the regulation of broadcasting regarding the appropriate solution to the problems presented in this area. Instead of invalidating the rule on the basis of speculation that it might be burdensome or inhibiting, the court below should have allowed the rule to operate for a time and permitted the Commission to adjust the rule, if necessary, as experience develops further. Ample opportunity will exist for the courts to remedy any defects in or improper application of the rule.

The political editorializing rule, involved only in *RTNDA,* is similarly valid. It is directed to a matter of vital public concern, and is precise and explicit in the requirements it prescribes. Moreover, any burdens incident to compliance therewith are quite attenuated. Accordingly, the editorializing rule, like the personal attack rule, is in no way inconsistent with the First Amendment.

ARGUMENT

I

THE FAIRNESS DOCTRINE UNDERLYING THE POLICIES AND RULES HERE INVOLVED CONSTITUTIONALLY REFLECTS THE PUBLIC INTEREST IN FAIR ACCESS TO THE MEDIUM OF BROADCASTING

The policy on personal attacks applied in *Red Lion* and the rules on personal attacks and political editorials involved in *RTNDA* are facets of the general principle that broadcasters have affirmative responsibilities to present conflicting views on controversial issues of public importance. This general principle, which has come to be known as the Fairness Doctrine, is closely related to the statutory prescriptions of Section 315 of the Communications Act on broadcasting by political candidates, and has itself received statutory recognition.[17] While the opinion of the Seventh Circuit in *RTNDA* disavowed any holding that the Fairness Doctrine might contravene the First Amendment, it was so argued below and the court's invalidation of the Commission's rules necessarily casts doubt upon the viability of this underlying principle.

The Fairness Doctrine—and in particular the aspects thereof attacked in these cases—does not restrain or punish any statement that might be made on the air; rather, its whole purpose is to open the airwaves to freer speech, to a diversity of views. Viewed objectively, the position underlying the attacks on the Commission's reply policies and rules

[17] 47 U.S.C. 315(a) (see *infra*, p. 66).

is simply that a broadcast licensee has a constitutional right to deny the public access to views with which he disagrees, or which he finds it unprofitable to broadcast. This position is unacceptable in relation to a medium whose special nature requires that control over available channels of expression be restricted, by governmental licensing, to a limited number of persons. We believe, with the District of Columbia Circuit, that corollary governmental action to preserve access to the broadcast medium for the expression of opposing viewpoints—far from being unconstitutional—serves the same interest in keeping the channels of communication open that underlies the First Amendment.

The Communications Act evinces the purpose of Congress "to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority * * *" (47 U.S.C. 301). The standard adopted to govern such use is the "public convenience, interest, and necessity" (47 U.S.C. 307(a), 309(a), 310(b)). See, *e.g.*, *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U.S. 266, 285. "Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license" (*Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, 598).[18] And this Court

has observed that "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138).

Over 25 years ago, in sustaining the validity of the Commission's Chain Broadcasting regulations, this Court rejected the contention that the First Amendment restricted the regulation of broadcasting in the public interest to the merely technical characteristics of radio transmission. *National Broadcasting*

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[18] While "[t]he Commission is given no supervisory control of the programs, of business management or of policy," since "the Act does not essay to regulate the business of the licensee," it is nevertheless "the ability of the licensee to render the best practicable service to the community" which forms "[a]n important element of public interest and convenience affecting the issue of a license" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475).

See also *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.), sustaining denial of renewal of a license used largely in aid of the licensee's pharmaceutical business. The court stated (47 F. 2d at 672): "When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought."

* * *

Co. v. *United States,* 319 U.S. 190, 226–227. The Court explained that (*id.* at 226):

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. *Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.* Because it cannot be used by all, some who wish to use it must be denied. * * * [Emphasis added.]

And this Court has noted in a related context that not every medium of speech is "necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (*Burstyn* v. *Wilson,* 343 U.S. 495, 502–503; see also Mr. Justice Frankfurter and Mr. Justice Jackson concurring in *Kovacs* v. *Cooper,* 336 U.S. 77, 89, 97). As was stated in *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1003 (C.A. D.C.):

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. * * *

Nonetheless, the Seventh Circuit's opinion in *RTNDA*, taking as its premise that the personal attack and political editorializing rules (and with them the policy applied in the *Red Lion* ruling, see A., No. 717, 363a–365a) "would be in flat violation of the first amendment if applied to newspaper publishers," answered in the negative the question "whether the need for technical, financial and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers * * *" (A., No. 717, 366a). That equating of broadcast licensees and newspapers is, we submit, unwarranted.

The Seventh Circuit made much of figures showing that the gross number of radio and television stations in the United States now exceeds the number of general circulation daily newspapers, thereby implying that it makes no constitutionally cognizable difference to a viewer or listener whether any station by itself provides a fair balance of views. But this raw comparison of numbers is highly misleading. It ignores the great number—and wide circulation—of printed materials other than daily newspapers, such as weekly newspapers, magazines and books. It blinks the fact that, in the case of most television and much radio broadcasting, the programming received by the public, however many stations it may be tuned to, emanates primarily from a handful of network sources. It ignores the physical limitations on the service area of any particular station—which restrict a particular viewer or listener to reception of a small number of stations; on the other hand, there is no such limit on the number of persons

who may obtain or be reached by a piece of printed material. And it disregards the fact that the amount of material a radio or television station can transmit is restricted by the number of waking hours in the day—as well as by broadcasters' economic interests in devoting as many as possible of those hours to entertainment programming—whereas such restrictions do not exist as to the number of pages that a newspaper or other printed matter can contain.[19]

Most important, the Seventh Circuit's emphasis on the number of broadcast outlets loses sight of the fun-

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[19] Just recently, in *Banzhaf* v. *Federal Communications Commission*, No. 21,285, decided November 21, 1968, the D.C. Circuit, in discussing broadcasting and the printed press, noted that there may be "a meaningful distinction between the two media justifying different treatment under the First Amendment." That was so, it suggested, because (slip op., pp. 32–33)

> [u]nlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets. Moreover, * * * [w]ritten messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air."

It should be noted that the D.C. Circuit's decision in that case, upholding the applicability of the Commission's Fairness Doctrine to cigarette advertising carried by broadcasters against, *inter alia*, First Amendment challenge, is being contested in this Court by a number of parties to that proceeding below (*e.g.*, *The Tobacco Institute* v. *Federal Communications Commission*, pending on petition for certiorari, No. 1036, this Term).

damental point that there are not enough of them to satisfy the demand of those who would be broadcasters. The crucial consideration is that "[t]he facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216). And, despite the view of the Seventh Circuit to the contrary (A., No. 717, 366a–367a), the available frequency spectrum, which must accommodate many uses of radio in addition to broadcasting, remains inadequate to meet existing demands, and new demands for spectrum space are constantly developing.[20] Within the broadcast field, in addition to the continuing need for regulation to prevent destructive electrical interference among stations, there is still a greater demand than there is availability of frequency space. The Commission's 1966 Annual Report thus speaks of "growing congestion" in the AM band (*id.* at 6). During 1967 there were 73 comparative hearings in the broadcast field involving two or

[20] The Director of Telecommunications Management, in an October 1966 Report on Frequency Management within the Executive Branch of the Government, stated (p. 13): "The rapid rate of growth in the use of the radio spectrum has exceeded, by a substantive margin, the increase in the allocated spectrum, our capability to use the higher frequencies, our technology, and our administrative methods and facilities. In fact, technology has created desire for additional uses faster than it has produced means to solve the problem of electromagnetic congestion. The part of the spectrum that we have learned how to use is now fully allocated to important civil and Government needs and is congested in key parts."

more applicants for the same frequency.[21] While economic conditions in some communities will not now support the new stations for which frequencies have been allocated, the demand in large communities presently exceeds the available space. The fact that there are some unused frequencies in areas of low population density, which has always been the case, does not alter the need for, or the nature of, governmental regulation of broadcasting in the public interest. Today, as before, a radio frequency is a scarce resource which must be apportioned among a limited group of users.

Thus, contrary to the Seventh Circuit's decision, the basis for congressional regulation of radio remains essentially the same as was the case when this Court examined the matter in *National Broadcasting Co.* v.

[21] For example, when the Commission revoked the license of AM station KRLA in Pasadena, California, there were 16 applications by parties seeking to use the vacated frequency. Docket No. 15752, designated for hearing on December 31, 1964, 30 Fed. Reg. 168. Eight applications were filed for St. Louis, Missouri, when the license of AM station KWK was revoked. Docket No. 17209, designated for hearing on February 21, 1967, 32 Fed. Reg. 3305. In a case recently decided by the District of Columbia Circuit, eight competing applicants challenged the grant to a ninth party of a permit for a new television station in Rochester, New York. *Star, Television, Inc.* v. *Federal Communications Commission*, No. 21,277, decided January 30, 1969. When the license of television station KSHO-TV, Las Vegas, Nevada, was rescinded, 7 parties sought the frequency. Applications are pending, but have not yet been designated for hearing. Similarly, six competing applicants have filed for a new UHF channel made available in Anaheim, California. That channel was added in August 1967 (32 Fed. Reg. 9815), and was designated for hearing in Docket No. 18295, *et al.*, on August 21, 1968, 33 Fed. Reg. 12591.

United States, 319 U.S. 190, 226 (see *supra*, pp. 43–44). In that case the Court found no constitutional infirmity in the Commission's rules prohibiting network contracts that restricted public access to programming. It did not find it necessary to consider whether some governmental agency might similarly restrict the power of newspapers to contract; nor did it object that the rules went beyond "technical, financial and ownership regulation," as did the Seventh Circuit here (A., No. 717, 366a). The interest of the public in the discussion of public issues constitutes one of the main premises upon which so much spectrum space has been allocated to broadcasting. *Farmers Union* v. *WDAY*, 360 U.S. 525; *Report on Editorializing*, 13 F.C.C. at 1249. This factor, and the special nature of broadcasting recognized in *National Broadcasting Co.*, provide ample constitutional justification for the Fairness Doctrine in general and as applied in these cases.[23]

It may be that the Congress—and its delegate, the Commission—could leave it to chance, as the Seventh Circuit suggested (A., No. 717, 369a), that the public

[23] In addition, it is our view that the Seventh Circuit treated the notion that the airwaves were imposed with a public trust (see, *e.g.*, *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3), certiorari denied, 327 U.S. 779), in too cavalier a fashion. It seems clear that the public generally has an important interest in the appropriate use of this valuable asset—the ability to communicate through the airwaves to the public at large. Congress has recognized this in establishing an agency to regulate broadcasting in the public interest, and in conferring on that body broad powers to accomplish that objective (see 47 U.S.C. 301, 309(h)).

will be adequately informed on both sides of controversial issues even if broadcast stations do not properly serve this function. But the question is whether government is constitutionally required to pursue such a course. Clearly, it is not.[23] If the matter were left to chance, it is difficult to see how the audiences of the stations which carried the attack upon Fred J. Cook could have any opportunity to hear his response. Perhaps he could write another book, but that is hardly the ideal solution. Newspapers do not ordinarily duplicate the service areas of particular broadcast stations, assuming they would print such a response. And the local media in particular locations may also tend to present a common view on particular issues.[24] Conversely, the Fairness Doctrine reasonably prevents such a blocking of controversial views, and does so, it is important to emphasize, through Commission rulings which can only serve to open a way for views otherwise denied access to the public.

[23] Chafee, in *Government and Mass Communications* (1947), relied upon by Red Lion (Br. 18, 23, 34), believed (Vol. II, p. 638) that the "FCC is the one department of the government which probably has the power to compel some measure of broadmindedness." However, while he thought it might be possible to give frequencies to proponents of particular views (*id.* at 642–643), it is now clear that if broadcasting may constitutionally be kept open to robust debate, it cannot be done by granting licenses upon the basis of political or social orientation. This would not only be impractical, "[b]ut Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190. 226).

[24] The Commission's records showed that as of the first of this year there were 1522 communities with only one radio station.

Prior to the Seventh Circuit's decision in *RTNDA*, no court had suggested that the First Amendment was affronted by the proposition that the Commission could act to preserve broadcasting as a medium open to full debate on public issues. On the contrary, the District of Columbia Circuit had presaged its *Red Lion* decision in two cases making clear its view that the public interest required fairness on the part of broadcast licensees. In *Noe* v. *Federal Communications Commission*, 260 F. 2d 739, 743 (C.A.D.C.), certiorari denied, 359 U.S. 924, in response to the contention that an applicant might not treat other religious faiths fairly, it was stated that should the applicant "in the future fall short of the rules and regulations of the Commission in regard to proper programming, the Commission may always review the matter in a renewal proceeding or otherwise." In another case involving allegations of consistent unfairness in the treatment of issues relating to race relations, the same court stated that "adherence to the Fairness Doctrine is a *sine qua non* of every licensee." *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1009 (C.A.D.C.). Moreover, in *Red Lion* itself, the court noted that, under the Fairness Doctrine, licensees "are not prohibited from broadcasting any program which [they] think suitable. * * * [They] are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting" (A., No. 2, 119).

Congress and the Commission thus may constitutionally protect the public's interest in the use of the available channels of communication, and the Fairness Doctrine constitutes a clearly appropriate implementation of the First Amendment's basic purpose. It has developed out of recognition of the import of the fact that with respect to this medium of speech, as with no other, the government necessarily affords to some, and denies to all others, the right of access to the public. The contention that the government lacks the power to preserve these scarce channels as avenues of expression open to conflicting viewpoints on significant public issues is amply answered by this Court's response to a similar contention in *Associated Press* v. *United States,* 326 U.S. 1, 20:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment * * * here provides powerful reasons to the contrary. *That amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.* Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means

> freedom for all and not for some. * * * Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. * * * [Emphasis added.][25]

This Court has articulated in case after case that the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media. It has been increasingly recognized that the interests of the public which the First Amendment seeks to foster are not in every case necessarily served by simply relying upon an unregulated "marketplace of ideas." That marketplace is increasingly one for the affluent and powerful, and some voices may accordingly seldom, if ever, be heard. Here the broadcasters and the Seventh Circuit have placed considerable reliance on this Court's decision in *Mills* v. *Alabama,* 384 U.S. 214. But they have entirely overlooked one significant point made toward the conclusion of the Court's opinion in that case, where the Court noted that "[*b*]*ecause the law prevents any adequate reply* to ["last-minute"] charges, it is wholly ineffective in protecting the electorate" from confusion in exercising the franchise (*id.* at 220; emphasis added). Other courts have similarly emphasized the

[25] As Professor Meiklejohn aptly stated, the First Amendment is directed against "mutilation of the thinking process of the community," for "[j]ust so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good." Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. Res. 94, 84th Cong., 2d Sess., p. 5.

importance of access to media of expression. In the district court opinion in the *National Broadcasting Co.* case, Judge Learned Hand stated (*National Broadcasting Co.* v. *United States,* 47 F. Supp. 940, 946 (S.D.N.Y.), affirmed, 319 U.S. 190):

> We agree that the [Chain Broadcasting] regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

In like vein, Judge Hand noted in *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y.), affirmed, 326 U.S. 1, that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." The Commission has properly concluded that "a multitude of tongues" may not in fact be voiced if broadcasters are wholly unregulated regarding their presentation of controversial issues of public importance. Its policy properly reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270). Judge Bazelon stated the concept perceptively in the D.C. Circuit's recent opinion in *Banzhaf* v. *Federal Communications Commission,* No. 21,285, decided November 21, 1968, slip op., p. 36:

> * * * A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance. That policy has been pursued by a general hostility toward any deterrents to free expression. *The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often.* Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to

the mass communications media is not a fair test of either an argument's truth or its innate popular appeal. [Emphasis added.][26]

The matter of access of the public, or, more precisely, those elements of the public with responsible ideas warranting a general airing, to the news media in general has been given increasing attention by the commentators. See Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L.Rev. 1641 (1967); Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447, 505–528 (1968).[27] The central thesis of the Barron article is that some ideas are unable to obtain access to the media of mass communication, and that therefore it is appropriate to reexamine certain of the premises on which First Amendment theory is grounded. There is no need here to explore the outer limits of the

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[26] Moreover, in the *Red Lion* case itself, Judge Tamm stated that the Fairness Doctrine, "rather than limiting the [broadcasters'] right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast" (A., No. 2, 120). We recognize that Judge Fahy, in concurring, noted that he had "doubts" about the soundness of this proposition (A., No. 2, 132). Perhaps Judge Tamm's focus on the right of "the victim" as an individual is what disturbed Judge Fahy. We assume, however, that the notion Judge Tamm was seeking to express is identical to that of Judge Bazelon in the *Banzhaf* case, and that he thought of "the victim" as a spokesman for the opposing point of view rather than simply an individual seeking personal vindication.

[27] See also Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701, 714 (1964).

theme there suggested,[28] for the instant cases involve at most an application of the notion to the field of broadcasting—a field already subject to substantial governmental regulation to further the public interest.

Unlike the Barron article, which deals with news media generally, the Barrow article focuses more specifically on the medium of broadcasting with which we are here concerned. Citing Judge Hand's opinion in the *National Broadcasting Co.* case (see *supra*, pp. 54–55), Barrow suggests that "the freedom of speech of the listeners and viewers" must be given primary consideration in the broadcasting context (37 U. Cin. L. Rev. at 506–507). He proceeds to point out that, "[e]xcept for the recent decision of the court of appeals in the *RTNDA* case, no judicial decision has been found in which a court has held that the Commission's concern with program service in the public interest contravened the first amendment" (*id.* at 510), and concludes that "[p]ermitting a person to reply to a personal attack upon him is [itself] an exercise of free speech" (*id.* at 528).

If the essential purpose of the First Amendment is kept in mind, it follows that broadcasters have an inherent responsibility to serve the public by affording access to conflicting and divergent views on issues of public importance. Indeed, it is peculiarly in this gov-

[28] A number of this Court's decisions have sought to protect and implement a rather general right of access on behalf of elements of the public whose ideas might not otherwise be promulgated. See, *e.g.*, *Staub* v. *City of Baxley*, 355 U.S. 313; *Martin* v. *Struthers*, 319 U.S. 141; *Schneider* v. *State*, 308 U.S. 147.

ernmentally regulated field of broadcasting that the predicates and machinery for effectuating such a right of access exist. The Commission's Fairness Doctrine is designed to serve this goal, and the Seventh Circuit's undermining of that general principle should not be allowed to stand.

II

THE PERSONAL ATTACK RULE—LIKE THE RULING IN RED LION—IS A VALID EXERCISE OF THE COMMISSION'S REGULATORY POWERS AND DOES NOT OFFEND THE FIRST AMENDMENT

The Commission's personal attack rule was designed, as the Commission stated in the adopting Memorandum Opinion and Order, "to effectuate important aspects of the well established Fairness Doctrine" by clarifying and making "more precise the obligations of broadcast licensees where they have aired personal attacks" (A., No. 717, 210a). The rule does not "proscribe in any way the presentation by a licensee of personal attacks," but provides for "appropriate notification steps and * * * an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint" (A., No. 717, 212a). Sanctions (consisting of monetary forfeitures of up to $10,000) may be imposed, but only for "willful or repeated violation" of the rule (A., No. 717, 210a).

The ruling under review in *Red Lion* involved an *ad hoc* application of the same principles and procedures subsequently codified in this rule. There the

Commission found that the personal attack policy had been violated, but did not purport to impose any sanction upon the station. The D.C. Circuit found neither a lack of constitutional validity nor a want of statutory authority to issue such a ruling. It recognized that the reply requirement "may, and probably does, impose a burden on the licensees," but it found the burden "not an unreasonable one" (A., No. 2, 124). This was so, it concluded, since "broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust" (*ibid.*). Moreover, that court found the various aspects of the policy "sufficiently explicit to inform those who are subject to them" what they are required to do and when the doctrine is triggered (A., No. 2, 122).

In *RTNDA,* however, the Seventh Circuit held that the personal attack rule violates the First Amendment. The court concluded that the rule places impermissible burdens upon licensees likely to constrict their choice of programming (A., No. 717, 362a), and that the Commission had failed to demonstrate that the aims of the rule could not be achieved by less restrictive means (A., No. 717, 369a). Having invalidated the rule on constitutional grounds, the court found it unnecessary to determine whether promulgation of the rule was within the Commission's statutory power (A., No. 717, 371a).

It is our position that the personal attack rule, as a codification of the previous policy applied in indi-

vidual cases, including *Red Lion,* suffers from neither statutory nor constitutional infirmity. We endeavor to show that the Commission is vested with ample authority to adopt rules designed to secure the public interest in fairness in broadcasting, that the rule here in issue serves that legitimate purpose, and that the rule as framed does not infringe First Amendment rights of broadcast licensees.

A. THE PERSONAL ATTACK RULE IS A VALID EXERCISE OF THE COMMISSION'S RESPONSIBILITY TO REGULATE BROADCASTING IN THE PUBLIC INTEREST

Federal regulation of radio communications began in 1910, when radio broadcasting was in its infancy and television was unknown (*National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210). By 1927, when the Federal Radio Commission was established and the predecessor of the Communications Act of 1934 was adopted, the rapid and largely uncontrolled growth of radio posed a serious threat to the utility of a valuable national asset. In conferring regulatory responsibility upon the Commission, "Congress was acting in a field * * * which was both new and dynamic," and "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers" (*id.* at 219). Guided by the standard of "public interest, convenience, or necessity," the Commission was charged by Congress with furthering "the interest of the listening public in 'the larger and more effective use of radio'" (*id.* at 216).

An important aspect of the congressional scheme of regulation was "to develop broadcasting as a political outlet" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 535; 47 U.S.C. 315(a)). In furtherance of this interest, the Commission has encouraged the use of the medium for "the presentation of news and programs devoted to the consideration and discussion of public issues" (*Report on Editorializing*, par. 6, p. 1249). It was inevitable that the use of radio for "uninhibited, robust, and wide-open" "debate on public issues" (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270) should pose the question of the appropriate treatment of personal attacks. As this Court had earlier noted, "In the realm of * * * political belief, sharp differences arise [so that to] persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification * * * and even to false statement" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 310). The Commission's experience confirmed the view that personal attacks are often resorted to as a tool of persuasion in the discussion of public issues (see, *e.g.*, Fairness Primer, pars. 20–27), and the Hargis broadcast which provoked the complaint in *Red Lion* affords a not untypical example of the problem.

In seeking to apply principles of fairness to the special problem raised by personal attacks in the presentation of one side of important public issues, the Commission affirmatively sought to further and foster the full and robust debate of such matters. It has long recognized that official action designed to prevent such attacks would not only exceed its proper function but

would also defeat the basic purpose of encouraging free speech.[29] Thus the Commission has sought rather to insure simply that licensees afford those attacked in such discussions an opportunity to respond, to the end that the public may be completely informed—the cardinal objective of the Fairness Doctrine. Initially, the Commission pursued this objective on an *ad hoc*

[29] The Commission has consistently emphasized this point in word and deed. See, *e.g.*, *Report on Editorializing*, 13 F.C.C. 1246, 1247–1248 (1949); *Pacifica Foundation*, 36 F.C.C. 147, 149 (1964); *Anti-Defamation League of B'nai B'rith*, 4 F.C.C. 2d 190, 191 (1966), affirmed, *Anti-Defamation League* v. *Federal Communications Commission*, 403 F. 2d 169, 170 (C.A.D.C.), pending on petition for certiorari, No. 990, this Term, in which the Commission refused to find a licensee disqualified upon the basis of anti-Semitic remarks, stating:

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

In the face of this history, it is difficult to understand the basis for the view of the Seventh Circuit (A., No. 717, 359a) that "[a]pparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest."

basis, and in response to specific complaints it articulated the central elements of its policy—notice of the attack to be given and reply time to be offered.[30]

However, the Commission's experience demonstrated that reliance upon licensee compliance with the general standard of the Fairness Doctrine was not a satisfactory method of treating the personal attack problem. While the Commission could acquaint licensees with their responsibilities in such cases (as it sought to do in the Fairness Primer), there were grounds to doubt that they were being faithfully observed. For example, the attack in *Red Lion* was in a syndicated program carried by numerous stations, only one of which notified Cook of the attack (A. No. 2, 26),[31] and even that station insisted upon payment as a condition of offering time for reply (A., No. 2, 26, 27).[32]

The Commission reasonably concluded that licensees' demonstrated failure to comply with their obligations under the Fairness Doctrine in the personal attack area was traceable in substantial part to the lack of appropriate sanctions for noncompliance.

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[30] These same basic elements were summarized in the Fairness Primer in 1964 and were later codified in the personal attack rule involved in *RTNDA*.

[31] Moreover, in the course of his unproductive efforts to obtain reply time through his own efforts, Cook learned for the first time of similar attacks of which no notice had been given (A., No. 2, 27).

[32] For further indication of the Commission's experience with personal attack problems, see the following published rulings: *In re application of Clayton W. Mapoles*, 23 Pike & Fischer R. R. 586 (1962); *Letter to Billings Broadcasting Co.*, 23 Pike & Fischer R. R. 951 (1962); *Letter to Richard B. Wheeler*, 6

The Commission could hold out only the threat of ultimate nonrenewal of the license, but this was plainly not a suitable response to a violation by a licensee whose performance over the three-year license term otherwise adequately served the public interest. Of course, a consistent pattern of broadcasting personal attacks without taking steps to afford reasonable opportunity to respond might warrant the conclusion that the licensee had failed to operate in the public interest, but such a pattern might be difficult to detect and establish. The Commission does not, and as a practical matter cannot, monitor the programming of licensees; it can learn of personal attacks only when an interested party, most likely the person attacked, brings them to its attention. Thus a licensee who

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F.C.C. 2d 599; *Radio Denver, Inc.*, 5 Pike & Fischer R. R. 2d 570 (1965); *Letter to Mr. Tony Kehl*, 1 F.C.C. 2d 936 (1965); *Letter to Stations KBHC, KVIN, WJBS and WNKY*, 1 F.C.C. 2d 935 (1965); *Letter to Stations KBEN and WEYY*, 1 F.C.C. 2d 933 (1965); *Letter to Grand Canyon Broadcasters*, 1 F.C.C. 2d 931 (1965); *Letter to Garrett Broadcasting, Inc.*, 1 F.C.C. 2d 929 (1965); *Letter to Susquehanna Broadcasting Co.* (WEDR–FM), 10 Pike & Fischer R. R. 2d 448 (1967); *Letter to Seminole Broadcasting Co.* (WSWN), 10 Pike & Fischer R. R. 2d 449 (1967); *In re Application of Capitol Broadcasting Company, Inc.* (WRAL), 8 F.C.C. 2d 975, 10 Pike & Fischer R. R. 2d 579 (1967); *In re Petition to Revoke License of Springfield Television Broadcasting Corporation* (*WRLP*), 4 Pike & Fischer R. R. 2d 681 (1965); *Letter to Mid-Florida Television Corporation*, F.C.C. 64–863, Sept. 16, 1964, unreported; *Letter to Capital Broadcasting Corporation, Inc.*, 2 Pike & Fischer R. R. 2d 1104 (1964); *Telegrams to Times-Mirror Broadcasting Company*, 24 Pike & Fischer R. R. 404, 24 Pike & Fischer R. R. 407 (1962); *Letter to Radio Albany, Inc.* (*WALG*), 4 Pike & Fischer R. R. 2d 277 (1965); *Letter to the McBride Industries, Inc.*, F.C.C. 63–756, July 30, 1963, unreported.

ignored the notice requirement would not only tend to prevent timely response to the attack, but would make it unlikely that his consistent noncompliance with Commission policy could be documented at license renewal time.

Section 503(b) of the Act provides, however, for the imposition of monetary forfeitures for willful disregard of a Commission rule. Thus, by codifying the personal attack policy into a formal rule, the Commission reasonably intended to promote fairness in the personal attack area by arming itself with a sanction less harsh, and thus more credible, than loss of license. Moreover, although all the components of the licensees' personal attack responsibilities had been spelled out previously in public statements, the Commission's experience indicated widespread uncertainty regarding, or simply disregard of, those duties. Therefore, an additional important objective of formal codification was to "clarify and make more precise the obligations of broadcast licensees" (A., No. 717, 210a).

In view of these problems, and the Commission's general statutory obligations as they have been interpreted by the courts, there can be no doubt that both the ruling against Red Lion and the personal attack rule as subsequently adopted were well within the Commission's authority and obligation "as public convenience, interest, or necessity requires, * * * [to] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act of 1934] * * *" (47 U.S.C.

303)."[33] And any doubt as to the statutory authority for the underlying Fairness Doctrine was removed by Congress's explicit endorsement of the doctrine in the 1959 amendment to Section 315 (see *supra*, pp. 17–22; *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994, 999, n. 5 (C.A.D.C.)). Any fair reading of the language of Section 315(a) places the obligation on licensees to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[34] That the wording of the amendment is in the form of a recognition of an existing obligation does not detract from its relevance here.

B. THE PERSONAL ATTACK RULE DOES NOT UNCONSTITUTIONALLY BURDEN FREE EXPRESSION BY LICENSEES

In holding that the First Amendment prohibits adoption of the personal attack rule, the Seventh Circuit found that the rule "pose[s] a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on * * * controversial issues of public importance" because it is economically and practically burdensome, vague, and accompanied by specific sanc-

[33] Moreover, Section 303(g) mandates the Commission to "generally encourage the larger and more effective use of radio in the public interest." To the same end, Section 308(b) authorizes the Commission to consider "the citizenship, character, and financial, technical, and other qualifications" of applicants for station licenses, and also "the purposes for which the station is to be used."

[34] See also Section 315(c), which authorizes the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

tions (A., No. 717, 357a). We submit that these criticisms are unjustified. Rather, the rule (and the policy applied in *Red Lion*) is calculated to enhance the listening public's exposure to contrasting views on controversial subjects. And it is not so imprecise or vague that licensees will be forced to choose between curtailing controversial programming or risk incurring penalties for violating the rule.

At the outset, we stress that the rule is directed only at a relatively narrow class of cases. First, it applies only to attacks occurring "during the presentation of views on a controversial issue of public importance." Thus, no licensee need fear that the rule may be triggered by purely personal attacks in which the public at large has little interest. Second, the Commission has expressly exempted certain classes of programs, including on-the-spot coverage of news events, bona fide newscasts (along with commentary and analysis carried therein) and news interviews, from the coverage of the rule, both because they did not generally give rise to the problems at which the rule is primarily directed and in order to alleviate any possible concern that the rule might unduly interefere with such programming. In this regard, the rule largely follows the pattern set by Congress in Section 315 with respect to exemptions from the "equal time" requirement relating to political candidates.[35]

[35] The primary differences are that Section 315(a) prohibits any licensee censorship, and requires "equal opportunities" for candidates, while the rules require only a reasonable opportunity to respond. So too, a political candidate may be required to pay if his opponent paid for his time. The personal attack rule

The heart of the personal attack rule is the requirement that the licensee give notice and a copy or summary of the attack to the person or group attacked and offer an appropriate opportunity to respond. This procedure is clearly necessary if the listening public is to hear a timely and responsive reply.[36] While the Seventh Circuit asserted that these requirements impose "substantial economic and practical burdens" on licensees, it failed to elaborate any reasons in support of its conclusion. The cost of providing notice and a

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exempts very much the same classes of news programs as Section 315(a), except for the news documentary, as to which Section 315(a) gives an exemption if a candidate's appearance is incidental to the main subject matter. Since a documentary is assembled over a period of time, the Commission saw no problem here warranting an exemption (A., No. 717, 336a–337a). A program prepared very quickly to cover a fast-breaking development might very well be an exempt special newscast. In this regard, the Seventh Circuit's criticism of the Commission for endeavoring to follow the line drawn by Congress in Section 315 as to exemptions (see A., No. 717, 362a, n. 38) seems wide of the mark. While the problem of equal time for political candidates and the problem of personal attacks and political editorials are distinguishable, they are nonetheless closely related. Thus, the Commission cannot be taken to task for attempting to track Section 315(a)'s exemptions in delineating programs not covered by the personal attack rule, particularly since that section provides the statutory basis for the Commission's action. Indeed, the Seventh Circuit's rationale here raises serious questions about the constitutionality of Section 315(a) itself, as well as the Commission's rules.

[36] There is here an obvious difference from the situation presented by an attack printed in a newspaper or magazine. While the printed attack is always available as a permanent record of what was said, there is ordinarily no way for the object of a broadcast attack to know exactly what was said unless the broadcaster provides a tape or script.

copy of an occasional attack is plainly not substantial. No licensee is obliged to do more than make a reasonable effort to locate the person attacked. If a script or tape of the attack is available, it can readily be forwarded to the person involved; if no script or tape is at hand, furnishing a summary satisfies the licensee's obligation.

Nor is the requirement that response time be offered an undue burden. First, the rule accords the licensee wide discretion to determine the amount of time suitable to a particular response and to schedule the response so as to minimize disruption of program schedules. Second, in many instances the person attacked will decline to exercise the right of response. Third, a licensee is free to seek sponsorship for the reply. The soundness of the Commission's refusal to make the right to reply conditional on the willingness or inability of the person attacked to purchase time is plain. In *Red Lion,* the attack complained of was made on a syndicated program, carried on numerous stations. If a person attacked on such a syndicated program or on a network program (particularly a television program) were required to buy time to respond, the opportunity to reply would be nullified in practice and the public's interest in hearing it would not be served. For this reason, the Commission has properly decided that a station may not leave the public uninformed simply because sponsorship or payment by the person or group attacked is not forthcoming (A., No. 2, 39, 48).

Although respondents in *RTNDA*, both before the Commission and the court below, raised the spectre of insurmountable practical difficulties, they at no time attempted to give content to these fears.[37] The contrast with the objections actually raised by one licensee faced with a concrete personal attack situation is instructive. In *Red Lion*, the licensee never, in its correspondence with the complainant and the Commission, suggested that giving notice or scheduling reply time would be burdensome to it. Red Lion resisted only the Commission's direction that it make reply time available to Mr. Cook without charge if Mr. Cook was unwilling to pay for it, stating that it would have granted free time only if Mr. Cook had been willing to assert an inability to pay (see *supra*, p. 29).

No showing has been made that the personal attack policy was burdensome to licensees (or stifled broadcast debate) during the years when it was in effect prior to

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[37] Neither NBC (A., No. 717, 63a–72a) nor CBS (*id.* at 73a–81a) made any attempt at such a showing in their comments during the rule-making proceeding. *RTNDA* urged (*id.* at 92a *et seq.*) that the equal opportunities for political candidates required by Section 315(a) limited political debate (an issue not presented here), and also claimed (*id.* at 132a *et seq.*) that the Fairness Doctrine and the requirements of the rules were similarly inhibitory. It attached a supporting Appendix of anonymous comments made to the drafters of the pleading (*id.* at 157a–167a), which also was devoted in substantial part to political broadcasts, and otherwise indicated that some licensees either wished to avoid putting on views with which they or a large part of their audience disagreed, or found some difficulty in narrowing the number of points of view to be heard on an issue. No examples, actual or conjectural, were given in the area of personal attacks or political editoralizing, and such

adoption of the rule;[38] surely it can be assumed that most licensees have been conscientious enough to observe the policy even in the absence of the direct sanctions that the rule now imposes. Indeed, a survey of broadcasters' attitudes toward the rule and other aspects of the Fairness Doctrine conducted by a Senate subcommittee in 1968 showed that only a small minority thought that the rules would be burdensome or would discourage broadcasts on controversial issues.[39]

Similarly unconvincing is the Seventh Circuit's hypothesis that the alleged vagueness of the rule and the possibility of incurring monetary penalties for noncompliance will have a chilling effect on controversial programming. It may be conceded "that such terms as 'attack,' 'character,' and 'like personal qualities' are subject to diverse interpretations and appli-

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material could thus not furnish a basis for a finding of any inhibition actually caused by the rules at issue. We recognize that CBS attached to its brief in the court of appeals two "exhibits" (not presented to the Commission in the rule-making proceeding) purporting to contain possible examples of problems that might arise under the rules (A., No. 717, Vol. II). But CBS has made no specific showing of any actual inhibition; moreover, most of the examples given are simply inapposite under the rules as later amended in March 1968 (see *supra*, pp. 35–36).

[38] On the contrary, it has been the Commission's "experience over the years of operation in this area that there has been no indication of inhibition of robust debate by our fairness policies; indeed, such debate has been increasing, not declining, during the last 7 years when the personal attack principle was being developed and brought specifically to the notice of all licensees * * *." *Storer Broadcasting Co.*, 11 F.C.C. 2d 678, 680 (1968).

[39] Of 5,053 broadcasters answering the pertinent portion of the questionnaire, 2,574 (or 51 percent) approved of the personal attack rule, 2,024 (or 40 percent) disapproved, and 455.

cations" (A., No. 717, 360a). But the more relevant question, we submit, is whether the language of the rule, taken as a whole, enables a licensee to make a reasoned judgment as to whether a given statement falls within its scope. We believe that the Commission's standard—"an *attack* upon the honesty, character, integrity or like personal qualities of an identified person or group"—is capable of reasonable interpretation by licensees (emphasis added).

It is clear that an "attack" is something quite different from mere mention, comment, or even criticism. What the Commission had in mind by "attack" is perhaps best illustrated by the Reverend Hargis' purposeful assault on the honesty and integrity of Mr. Cook in the only concrete controversy before the Court. In the course of a discussion of then candidate Goldwater and the political right, Reverend Hargis had occasion to treat of a book by Cook critical of Goldwater. For the express purpose of discrediting

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(or 9 percent) had no opinion. Of the 2,024 broadcasters who disapproved, only 323 thought the rule would discourage broadcast of controversial issues. Other reasons for opposing the personal attack rules were as follows: broadcasters are responsible and will be fair—508; the rule would violate the first amendment—371; the rules lack sufficient flexibility—335; the rules are too vague—259; civil remedies for libel and slander provide sufficient protection—243; the rules may lead to government control of programming—230; it is burdensome to present transcripts and to notify persons attacked—204; and if the program on which the attack occurred was sponsored the time for reply should be purchased—42. Staff Report of Senate Subcommittee of the Committee on Commerce, 90th Cong., 2d Sess., Report on Communications (Committee Print 1968), at 81–82; see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447, 495–498 (1968).

the book (A., No. 2, 61), Hargis challenged not the book's ideas, but its author: "Who is Cook? Cook was fired * * * after he made a false charge publicly on television * * *. Fred Cook * * * had made up the whole story and this confession was made to New York District Attorney, Frank Hogan * * *" (A. No. 2, 60). It is precisely this type of personal vilification in the context of the discussion of public issues that the rule is intended to cover. Red Lion at no time undertook to deny that this was a personal attack or that it had failed to recognize it as such. We know of no basis for believing that experienced and responsible broadcasters will have extraordinary difficulty in identifying such attacks in the future, or distinguishing them from vigorous criticism. As the D.C. Circuit concluded, "Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application" (A., No. 2, 122), citing *Connally* v. *General Construction Co.*, 269 U.S. 385, 391.

This is not to suggest that, in a given instance, reasonable men may not differ as to whether an attack covered by the rule has occurred. But the Commission has been at pains to point out that "the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle" (A., No. 717, 215a). Indeed in *L. E. White, Jr.*, 11 F.C.C. 2d 687 (1968), a case arising under the new rule, the Commission stated that there was no "question of imposing a forfeiture in the circumstances of this case where the station has made a

good faith judgment and its actions do not reflect the flagrant, clear-cut case of violation for which we stated that we would consider imposition of a forfeiture." Moreover, the forfeiture penalty of Section 503(b) of the Act by its own terms is applicable only upon the willful or repeated failure to observe a Commission rule. As has been noted, the Commission's order in *Red Lion* did not purport to carry any direct sanction.

The instant situation is thus distinguishable from *New York Times Co.* v. *Sullivan*, 376 U.S. 254, where this Court held invalid under the First and Fourteenth Amendments a rule of law exposing a newspaper to "libel judgments virtually unlimited in amount" (376 U.S. at 279) for defamatory criticism of the official conduct of a public officer, even though actual malice was not proved. The personal attack rule is not attended by any such danger. It does not impose a penalty on a licensee for any statement he may broadcast. The cost of complying with the rule in the few instances where it might apply—giving notice, providing a copy or summary, and offering reply time—does not begin to approach the burden imposed on speech in the *New York Times* situation. A willful or repeated violation of the personal attack rule may result in monetary forfeiture. But that results not from what is said by the broadcaster, but from his failure to accord the person attacked an opportunity to reply. Both the purpose of the rule and the thrust of the remedy differ radically from the circumstances involved in such cases as *New York Times*. Libel laws

provide for private redress; the personal attack rule seeks to protect the public's access to conflicting views on controversial issues, regardless of the truth or falsity thereof and the presence or absence of malice. Thus, whatever relevance *New York Times* and its progeny have supports, rather than undermines, the purpose sought to be served by the rule—the promotion of wide-open debate.[40]

The Seventh Circuit suggested that the personal attack rule—and presumably also the policy applied in *Red Lion*—is unnecessary and ill-suited to achieve the goal of fair presentation of controversial issues (A., No. 717, 369a–370a). We believe that the foregoing discussion and the Commission's opinions explaining the background and purpose of the rule amply justify the approach taken. Neither the Seventh Circuit nor any of the parties to the Commission's rule-making proceeding has shown that the Commission was wrong in its judgment that the broadcasting of personal at-

[40] Other cases of official penalty dependent upon the nature of views expressed are similarly inapposite. Compare *Smith* v. *California*, 361 U.S. 147, where a State sought to make a bookseller criminally liable for offering obscene books whether or not he knew their contents, or *Lamont* v. *Postmaster General*, 381 U.S. 301, 306, where the statute "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," in a setting of official condemnation of the mail as "communist political propaganda," or *Speiser* v. *Randall*, 357 U.S. 513, dealing with the denial of a tax exemption to one engaging in certain speech. In the instant case, there is clearly no element of censorship, which "as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 527).

tacks presents a serious problem requiring some kind of regulatory remedy. Nor have they suggested any solution to this problem that might be better than that which the Commission has set forth in the rules; indeed, the comments of broadcasters—including the respondents in No. 717—in the rule-making proceeding were limited to broadside opposition to the notion of any rules and studiously avoided offering the Commission any assistance in formulating guidelines and procedures. Moreover, we submit, it is not the function of a court of appeals to substitute its own notions of the requirements of the public interest and the best means for satisfying those requirements for the experienced and informed judgment of the responsible regulatory agency. It is not enough for the court to have said that the Commission has failed to convince it of the need for and propriety of the rule; rather, the burden is upon those who seek to set aside such a rule to show that the Commission has misapplied its statutory mandates or has infringed the First Amendment.

The opponents of the rule and the Seventh Circuit have made much of the fact that the Commission has twice modified the personal attack rule in minor respects, once at the urging of the Department of Justice (see *supra,* p. 36). The Seventh Circuit stated that this "suggests that the Commission's aims in promulgating the rules are uncertain and changing" (A., No. 717, 360a), and in some way undermines their constitutionality. In fact, a reading of the Memorandum Opinions and Orders adopting the amendments together with the original Memorandum Opinion and Order adopting the rule (A., No. 717, 209a,

223a, 333a) indicates that there has been no deviation whatever from the aim of serving the fundamental principle of the Fairness Doctrine. Instead, the amendments have been merely refinements, upon further consideration, to insure that interference with broadcasters' news functions is avoided, a concern of the Commission throughout. It is evident that the problem that gave rise to the rule is a difficult one and that drafting an appropriate rule has been a troublesome task. That task may well not yet be finished and further refinements may be necessary or appropriate with further experience. The Commission has from the beginning sought constructive suggestions from those affected by the rule, and will welcome future assistance and information as to concrete problems that may arise in its application. That kind of interplay between regulators and regulated is of the essence of the administrative process.

We submit that, considering the nature of the problems, it was improper for the Seventh Circuit to strike down the personal attack rule on its face on the basis of nothing more than speculation that the rule might be burdensome to some broadcasters. A rule of this sort should be viewed by the courts in a different constitutional light from a statute, in view of the Commission's continuing power and duty to refine and modify it in consultation with those who are governed by it, and especially in view of the restrained enforcement policy that the Commission has announced here. It is pertinent to recall that a statute would never come before the courts under the present circumstances—without the benefit of the factual rec-

ord of a particular application. The mere fact that the agency might apply a rule in an improper manner is not sufficient ground for striking it down *ab initio*. *United States* v. *Sullivan*, 332 U.S. 689, 694.

If in actual application any of the burdens and inhibitions which the Seventh Circuit foresaw eventuate, it will be time enough then for the courts to act. The sensible course, and one consistent with the First Amendment, would be to allow the rule to operate for a time to see whether the fears and concerns of the broadcasters are justified.

III

THE POLITICAL EDITORIALIZING RULE IS CONSTITUTIONAL

The political editorializing rule was codified along with the personal attack rule, and is thus involved only in the *RTNDA* case. It requires that where a station itself opposes a candidate, or supports his opponent, the candidate not favored is to be notified within 24 hours of the editorial, given a script or tape, and offered a reasonable time to reply, either himself or through a spokesman, at the station's option.[41] If the broadcast is aired within 72 hours prior to the election, the licensee must comply far enough in advance of the broadcast to enable the candidate or candidates "to have a reasonable opportunity to prepare a response and to present it in a timely fashion"

[41] The distinctions from the personal attack rule (the shorter notice period and the absolute requirement of a script or tape) reflect the fact that the station itself originates the material broadcast in advance, and thus should have no difficulty in providing a script or tape promptly.

(A., No. 717, 219a).[42] The political editorializing requirement, as is the case with the personal attack requirement, is for a "reasonable opportunity" to respond, rather than for equal time.

The rule is designed to serve the same general interest as the Fairness Doctrine and the personal attack rule—to insure that the public has access to competing views on important public questions. It is beyond dispute that a public election is an issue of vital public concern in a free society. The same considerations which support the Commission's statutory power to promulgate the Fairness Doctrine and the personal attack rule (see *supra*, p. 66) make it clear that the political editorializing rule does not exceed the Commission's authority. Nor is there any substantial basis for the Seventh Circuit's conclusion that the political editorializing rule would impair licensees' First Amendment rights. The mechanical requirements of the rule are substantially the same as those applicable to personal attacks. We have already discussed why these requirements place no unreasonable burden on licensees (*supra*, pp. 67–71). Indeed, since the licensee knows when it plans to endorse a candidate and has a script available, compliance would seem to be a relatively simple and unburdensome matter.

The two actions of the Commission in enforcing the political editorializing requirements with respect to station KING, Seattle, Oregon, an *amicus* below,

[42] The difference from the statute condemned in *Mills* v. *Alabama*, 384 U.S. 214, which flatly prevented last-minute editorials or replies, is noteworthy. This rule could permit the editorial and the reply both to be broadcast on election day without hardship to either side.

referred to by the Seventh Circuit (A., No. 717, 357a, N. 26) as "graphically" illustrating their inhibitory effect, on the contrary demonstrate clearly the need for such a standard. Complaint was made by unendorsed candidates for the Seattle City Council in the primary and general elections of 1967 that the station was treating them unfairly.[43] One complaint was by Clarence F. Massert, one of 28 candidates in the primary election, that the station had offered him two repetitions of a one-minute announcement to be delivered at unspecified times to respond to the station's 20-second editorial endorsing five other candidates which had been aired some 30 times. The Commission found this not to constitute a reasonable opportunity to respond, both because of the inadequate number of repetitions and the lack of indication that comparable time periods were being offered. Similarly, a complaint by George E. Cooley in the following general election alleged that the station offered to carry 20-second replies on behalf of four unendorsed candidates only six times, although the station's 20-second editorial endorsing four candidates was carried some 24 times. The Commission told King that no question was raised concerning its determination to allot a total of 120 seconds of response time for each candidate not supported in the editorial, but

[43] The Seventh Circuit stated that in both instances the broadcast of editorials endorsing candidates was delayed for several weeks while the Commission considered the complaints before it. However, in each case the station indicated to the Commission that it had proceeded with the editorials as scheduled, and made no claim to the contrary.

that the one-to-four ratio in number of responses was not adequate (11 Pike & Fischer R. R. 2d 628). Upon appeal to the District of Columbia Circuit in the Cooley matter (*King Broadcasting Co.* v. *United States,* No. 21397), a stay of the Commission's order was denied. King did not demand an immediate hearing on the merits although the election was imminent.

With the exception of the King Broadcasting situation, which it appeared not fully to understand, the court below struck down the editorializing rule without discussion of how it specifically infringes First Amendment rights. Rather, the court permitted its conclusions with respect to the personal attack rule to color its judgment on political editorializing without further analysis. But even assuming *arguendo* that the court below was correct in holding that vagueness or burdensomeness was fatal to the latter, the same objections are not applicable to the editorializing rule. The questions are severable, and should have been given distinct treatment by the court below.

To whatever extent the personal attack rule is subject to claims of vagueness in formulation, the political editorializing rule is triggered only by a specific and readily identifiable event—a licensee editorial endorsing or opposing one or more candidates. Moreover, any burden of compliance with the notice requirement is minimal in the editorial situation. The licensee knows in advance of his intention to state a preference, the disfavored candidates are

readily indentifiable (applying the standards established for "equal time" purposes under Section 315) and tapes or scripts to inform disfavored candidates can be prepared with the editorial to be broadcast.

Questions as to what constitutes a "reasonable opportunity" to reply may arise from time to time, especially in situations involving many candidates for a single office. But in the *King Broadcasting* matter the Commission has already established guidelines of general application on the question of frequency of repetition and times of scheduling. And the Commission stands ready to advise and interpret as special situations arise; its advice can often be obtained in advance of actual airing of station editorials so that no interruption or delay need be feared in the licensee's expression of his preference. In any event, here again the licensee need not fear imposition of forfeitures if he has endeavored in good faith to offer reasonable opportunity for response.

Nothing in the political editorializing rule is in any way inconsistent with the First Amendment. Accordingly, the court below erred in reaching the contrary conclusion by failing to give specific attention to the formulation and operation of the rule.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit in No. 2 should be affirmed and the decision of the Court of Appeals for the Seventh Circuit in No. 717 should be reversed.

Respectfully submitted.

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INDEX

	PAGE
Questions Presented	2
Summary of Argument	3
Argument	7
THE FAIRNESS DOCTRINE AND THE COMMISSION'S PERSONAL ATTACK AND POLITICAL EDITORIALIZING RULES, WHICH PURPORT TO IMPLEMENT IT, VIOLATE THE FIRST AMENDMENT.	7
A. ***Broadcasting Is Entitled to the Protection Given the Rest of the Press Against Regulation of the Content of What It Publishes on Public Issues, Persons, and Events***	9
1. The Regulation of "Fairness" in Broadcasting Is Not a Necessary Consequence of the Need for Licensing	9
2. Broadcasting Cannot Be Distinguished From Other Media on the Ground That Diversity Is Lacking	15
3. Broadcasting Must Be Considered in the Context of the Communications Complex	27
B. ***The First Amendment Guarantees a Free Press, Not Governmentally Regulated Access to the Press***	30
C. ***The Commission's Rules Burden the Broadcast Press in a Way Which the First Amendment Does Not Permit***	44
CONCLUSION	54

Table of Cases

PAGE

Approved Personnel, Inc. v. *Tribune Co.*, 177 So. 2d 704 (D.C.App. Fla. 1965) 34n

Banzhaf v. *Federal Communications Commission*, —— F.2d —— (D.C. Cir. 1968) 7
Bay State Beacon, Inc. v. *F.C.C.*, 171 F.2d 826 (D.C. Cir. 1948) 13n
Bloss v. *Federated Publications, Inc.*, 5 Mich. App. 74, 145 N.W.2d 800 (1966) 34n
Brandywine-Main Line Radio, Inc. (WXUR), 4 R.R.2d 697 (1965) 52

Chicago Federation of Labor, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930) 13n
Commonwealth v. *Boston Transcript Company*, 249 Mass. 477, 144 N.E. 400 (1924) 34n

Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 7
Federal Radio Commission v. *Nelson Bros. Co.*, 289 U.S. 266 (1933) 13n
Friedenberg v. *Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930) 34n

Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dism.*, 281 U.S. 706 (1930) 13n

Henry v. *F.C.C.*, 302 F.2d 191 (D.C. Cir. 1962) 12n

PAGE

Johnston Broadcasting Co. v. *F.C.C.*, 175 F.2d 351 (D.C. Cir. 1949) 13n

KFKB Broadcasting Ass'n v. *F.R.C.*, 47 F.2d 670 (D.C. Cir. 1931) 13n

In re Louis Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931) .. 34n

Lafayette Radio Electronics Corp. v. *United States*, 345 F.2d 278 (2d Cir. 1965) 12n
Lamont v. *Postmaster General*, 381 U.S. 301 (1965) ..5, 45
Lord v. *Winchester Star, Inc.*, 346 Mass. 764, 190 N.E. 2d 875 (1963), *cert. denied*, 376 U.S. 221 (1964) 34n

Mack v. *Costello*, 32 S.D. 511, 143 N.W. 950 (1913) 34n
Martin v. *Struthers*, 319 U.S. 141 (1943) 36
Massachusetts Universalist Convention v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950) 34n
McIntire v. *Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946) 33n-34n
Mills v. *Alabama*, 384 U.S. 214 (1966) 5, 34-35, 45
Mrs. Madalyn Murray, 5 R.R. 2d 263 (1965) 51

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 12n, 14, 16
Near v. *Minnesota*, 283 U.S. 697 (1931) 46
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 5, 39

Poughkeepsie Buying Service, Inc. v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup.Ct. Orange Co. 1954) 34n

PAGE

Red Lion Broadcasting Co. v. *F.C.C.*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967) 7
Regents of the University System of Georgia v. *Carroll*, 338 U.S. 586 (1950) 12n
Rumely v. *United States*, 197 F.2d 166 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953) 10

Schneider v. *State*, 308 U.S. 147 (1939) 36
Shuck v. *Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1[redacted]) 34n
Shuttlesworth v. *City of Birmingham*, 37 U.S. Law Week 4203 (March 10, 1969) 15, 37
St. Amant v. *Thompson*, 390 U.S. 727 (1968) 4, 5, 7
Staub v. *City of Baxley*, 355 U.S. 313 (1958) 36

Tri-State Broadcasting Co. (KTSM-TV), 3 R.R. 2d 175 (1962) 52-53

United States v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) 3-4, 14
United States v. *Paramount Pictures*, 334 U.S. 131 (1948) 4, 7
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 12n

Young People's Ass'n for Propagation of the Gospel, 6 F.C.C. 178 (1938) 13n

STATUTES

Act of August 24, 1960, P.L. 86-677, 74 Stat. 554 ..... 48n

Treatises

PAGE

Berelson, *Communication and Public Opinion* in Schramm, Mass Communications (1960) 28n

II Beveridge, The Life of John Marshall (1919) 32

Blumer, *Suggestions for the Study of Mass-Media* (Chapter 10 of Burdick & Brodbeck, American Voting Behavior (1959) 27

Chafee, Government and Mass Communications (1965) 42, 43

Chenery, Freedom of the Press (1955) 18n

4 Elliot's Debates on the Federal Constitution (1876) 32

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PAGE

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Miscellaneous

Broadcasting Yearbook, 1966 ..... 19n, 20n

Broadcasting Yearbook, 1968 ..... 22n

Editor and Publisher Yearbook, 1966 ..... 19n, 20n

FCC Annual Report, 1967 ..... 17n

FCC News Release, Feb. 20, 1969 17

Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change* (U.S. Government Printing Office 1968) 29-30

Letter from FCC to NBC, CBS and ABC, dated February 28, 1969 51

PAGE

Letter from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC to NBC, dated September 13, 1968 50

Letter from Thomas Jefferson to Edward Carrington, January 16, 1787, in *The Papers of Thomas Jefferson,* ed. Boyd, XII reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, ed. LEVY (1966) .. 31

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McMillin, *New Voices in a Democracy,* 3 TELEVISION QUARTERLY 27 (1964) 47, 53

The Nation, January 23, 1967 ..... 49n

The New York Times, July 30, 1966 ..... 49n

NORTH, THE HISTORY AND PRESENT CONDITION OF THE NEWSPAPER AND PERIODICAL PRESS OF THE UNITED STATES (TENTH CENSUS OF UNITED STATES, VOL. 8) (1884) 18n

Report on Chain Broadcasting, FCC Dkt. No. 5060, May 1941 17

REPORT IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 25 R.R. 1901 (1949) 50

S. REP. No. 1539, 86th Cong., 2d Sess. (1960) 48n

TELEVISION FACTBOOK, 1966 ..... 19n

PAGE

TELEVISION FACTBOOK (No. 38, 1968-69 Edition) 21n, 22n

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Variety, November 30, 1966 .....49n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, NATIONAL BROADCASTING COMPANY, INC.

In order to avoid unnecessary repetition, National Broadcasting Company (hereinafter "NBC") adopts the following portions of the Brief filed by Respondent, Radio Television News Directors' Association (hereinafter "RTNDA Brief"): Opinions Below, Jurisdiction, Statutes and Regulations Involved, and Statement. NBC also adopts those portions of the argument contained in Points II and III of the RTNDA Brief relating, respectively, to the lack of statutory foundation for the Commission's rules and the inadequacy of the findings made by the Commission.

NBC is in general agreement with the constitutional argument as it is presented in the RTNDA Brief. As a

party however, which is one of those most directly affected by the Commission's policies in this area, both as a station owner and as the owner of a nationwide radio and television network, NBC believes it important to make its views known to the Court. Moreover, NBC believes it important that the Court, in determining the validity of the Commission's personal attack and political editorializing rules, consider the scope and implications of the "fairness" doctrine, of which the rules are merely one implementation.

Questions Presented

1. Whether the freedom of speech and of the press guaranteed by the First Amendment are abridged by the FCC's regulation of "fairness" in programming through rules which impose burdens on broadcasters who carry "personal attacks" or political editorials.

2. Whether the challenged regulations are authorized by the Communications Act.

3. Whether the challenged regulations are invalid because not supported by an adequate FCC investigation and specific findings upon the necessity of the restrictions in order to make available to the public a diversity of opinion.

Summary of Argument

The imposition by an arm of government of its standard of "fairness" on the press and the enforcement of that obligation by governmentally imposed sanctions is contrary to the constitutional guarantee of freedom of the press. The First Amendment specified the free press, along with the right of assembly, the right of petition and the right of free speech, as instruments of political action and debate which were guaranteed against suppression so that our process of self government could function effectively. The government's argument that the time has come when the press, or a part of it, must be regulated as to "fairness" by a Governmental agency is directly contrary to our tradition of a free press, as it has consistently been interpreted by this Court.

Governmental regulation, however well intentioned, which has the tendency or effect of muzzling the press, discouraging or inhibiting the robust expression of views, or compelling the expression of one idea rather than another is precisely what the constitutional guarantee was intended to prevent. The nature of the press is such that no single member of it can publish every view on every issue or everything that every individual wishes to say; a selection must therefore be made. The First Amendment requires that the members of the press, rather than the government, will, in the exercise of their editorial judgment, do the choosing, without the supervision, control or regulatory influence of the government or a governmental official. The crucial guarantee is that the publisher or broadcaster be "unfettered in his own selection of what to publish." *United States* v. *Associated Press,* 52 F. Supp.

362, 374 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945).

Broadcasting is an important part of the press to which this constitutional guarantee extends. *United States* v. *Paramount Pictures*, 334 U.S. 131, 166 (1948); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). Broadcasting must, of course, for reasons of technology, be regulated by a licensing system in order to prevent electronic interference. It does not follow, however, that the FCC may also regulate the "content" of what is broadcast by each licensee on controversial questions relevant to the process of self government. Such regulation is no more necessary or desirable for broadcasting than it is for other media; government regulation is not necessary to expose the public to a diversity of information and opinions, and, indeed would not serve that end; and it raises an impermissible threat of governmental censorship of the press.

There is an enormous multiplicity and diversity in broadcasting today. Radio and television voices are several times as numerous as newspaper voices. According to the Commission's latest figures, there are 7,411 broadcasting stations in the country. In 1965 there were only 1,751 daily newspapers, and the number was declining. In virtually every state and locality there are far more broadcasting voices than there are newspapers. There are many additional radio and television frequencies allocated to communities across the country which are not currently being used. The situation is radically different from what it was when the Communications Act was first adopted; the number of broadcasting voices has proliferated enormously. Other developing technologies are supplying the opportunity for even greater diversity.

Broadcasting voices are additive to those already being heard in the daily press, national magazines, and books and periodicals of all kinds. Network news organizations, in accumulating and presenting national and international news, provide news sources in addition to the wire services and the reporting staffs of the larger newspapers and magazines. Other means of expression have been found and used to bring particular points of view to the attention of the public—the demonstration, the political rally, and the parade. A greater range and variety of opinion is heard by the public today than has ever been heard in our history. The process of opinion formation is a complex one in which broadcasters and the other national media play only a part.

Against this background a reversal of the policy which has kept the press free of governmental restraint or compulsion has not been shown to be necessary or desirable—either for broadcasting or for the media in general.

The Commission's "fairness" doctrine and personal attack and political editorializing rules impose burdens on free expression far heavier than burdens which this Court has repeatedly struck down. The risk of prosecution for libel, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); the requirement of verifying material before it is published, *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); the requirement of filling out and returning a card in order to receive particular communications, *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); and the prohibition of publishing editorials on election day, *Mills* v. *Alabama,* 384 U.S. 214 (1966) have all been held to impose too heavy a burden. A requirement that a station broadcast a point of view only on the condition that time in the limited broad-

cast day also be allotted to other points of view specified by the Commission imposes at least as heavy a burden. A requirement that in a great number of indefinable situations a particular view can be expressed only if transcripts are sent to particular persons or groups and free broadcasting time be given them goes even further.

Moreover, the Commission's policy and regulations are unconstitutionally vague. The Commission has recognized that its rules do not adequately define the situations to which they apply. Phrases like "attack" and "like personal qualities" will hold whatever content the Commission wishes to pour into them. The "fairness" doctrine in its broad contours is even vaguer. Application of these policies by the Commission necessarily involves it in value judgments as to the merit and importance of particular viewpoints.

The Commission's rules and policy provide an uncertain guide to the broadcaster and give the Commission an enormous censorial power. The capacity to exercise such power in a context in which the Commission's lifted eyebrow carries with it the threat of fines or forfeitures, or the ultimate death penalty of license denial, is an unconstitutional infringement on the freedom of the broadcast press.

Argument

THE FAIRNESS DOCTRINE AND THE COMMISSION'S PERSONAL ATTACK AND POLITICAL EDITORIALIZING RULES, WHICH PURPORT TO IMPLEMENT IT, VIOLATE THE FIRST AMENDMENT.

In this case and the *Red Lion* case[1] this Court is called on for the first time to deal directly and specifically with the question whether and to what extent Congress and the Federal Communications Commission can regulate the content of radio and television programming.

The Court has previously concluded that broadcasting is a part of the press to which First Amendment protection extends. *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). It could hardly have decided otherwise since broadcasting is an important vehicle for the dissemination of information and opinion, on which many people rely for information and views on matters of public concern. An important part of the role traditionally performed by the press is now performed by broadcasters.

This Court has also previously indicated that, whatever other powers the FCC may have, they do not extend to the regulation of the content of radio and television programming. As the Court said in *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940):

> "The Commission is given *no supervisory control of the programs,* of business management or of policy" (emphasis added).

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[1] *Red Lion Broadcasting Co.* v. *F.C.C.,* 381 F.2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967).

The Court of Appeals for the District of Columbia Circuit, which had been generally hospitable to FCC regulation in this area, in a recent case involving an application of the "fairness" doctrine cautioned that:

> "... it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (*Banzhaf* v. *Federal Communications Commission*, —— F.2d —— (D.C. Cir. 1968)).

As raised here, the issue is a particularly crucial one since the programming which the Commission has sought to regulate by its "fairness" doctrine is programming which deals with "controversial issues of public importance." The personal attack rule applies to personal attacks "during the presentation of views on a controversial issue of public importance" and the political editorial rule applies to programs endorsing or opposing candidates for public office. Thus, the expression at which the Commission's policy and rules are directed is, without exception, expression lying at the very heart of the process of self government where the importance of free expression and the danger of governmental intervention are clearest.

The Court of Appeals, in invalidating the regulations under the First Amendment, held only that these regulations are unconstitutional upon this record. Two constitutional issues are, however, posed, either of which might warrant invalidation of the Commission's rules. The first question is whether it is consistent with the concept of a free press, which is embodied in the First Amendment, for the Commission to regulate the "fairness" of what is broadcast. The second question is, whatever the constitutionality of the "fairness" doctrine, do the Com-

mission's personal attack and editorializing rules so burden and inhibit freedom of the press and free expression as to be unconstitutional?

A. *Broadcasting Is Entitled to the Protection Given the Rest of the Press Against Regulation of the Content of What It Publishes on Public Issues, Persons, and Events*

The Government's argument that the free press guarantee against government control of what is published may be cast aside for broadcasting rests on two alternative propositions: First, that this inevitably follows from the fact that the "available channels of expression [must] be restricted, by governmental licensing, to a limited number of persons"; second, that there are so few sources of broadcast information that such regulation is necessary to secure a diversity of expression. We shall demonstrate that both of these propositions are false.

1. The Regulation of "Fairness" in Broadcasting Is Not a Necessary Consequence of the Need for Licensing

In part, the Government's argument is divorced from any consideration of the absolute number of broadcast voices available or the comparative number of broadcast voices as against the number of voices in other media. In this branch of the argument the Government asserts that the mere fact that broadcasting must be licensed and that, at least in some areas, there are more applicants than there are frequencies, justifies the regulation of "fairness" in the programming of individual broadcasters. Thus, the Government argues that the propriety of such regulation follows from the fact that the available channels are "restricted, by governmental licensing, to a limited number

of persons" (Government Brief, p. 42) and that the crucial fact is that "there are not enough . . . [available outlets] to satisfy the demand of those who would be broadcasters" (Government Brief, p. 47). Elsewhere the Government frames the argument somewhat differently, suggesting that, because there is a regulatory apparatus, it must be used for this purpose. Thus, the Brief suggests that regulation of "fairness" in broadcasting is appropriate because this is "a field already subject to substantial governmental regulation to further the public interest" (p. 57) and because "the predicates and machinery for effectuating . . . a right of access exist" (p. 58).

It obviously does not follow from the fact that there is regulation of one sort that there can or should be regulation of another sort. As the Court said in *Rumely* v. *United States,* 197 F.2d 166 (D.C. Cir. 1952) [per Prettyman, J.], *aff'd,* 345 U.S. 41 (1953):

> "*It is clear that authority over a subject matter does not import authority over all activities of persons concerned in that subject matter.* Especially is it true that power over a subject matter involving speech, press, religion, assembly and petition does not go beyond the power to do that which is essential to be done in protection against a public danger." (197 F.2d at 176) (emphasis added).

There is also an unbridgeable logical gap between the premise that licenses must in some instances be denied to those who want them and the conclusion that "fairness" on the part of individual broadcasters should be regulated.

We note at the outset that the essential need for broadcasting regulation does not flow, as the Government suggests, from the fact that there are more persons who wish to broadcast than there are places in the frequency spec-

trum. Even if there were room for all, regulation would be necessary in order that two broadcasters not occupy the same space. It is true that, whenever the number of applicants exceeds the number of frequencies available, the Commission may be required, in addition to assigning frequencies, to select among the applicants. The Government concedes, however, that this second step is not universally or inevitably necessary when it says:

> ". . . economic conditions in some communities will not now support the new stations for which frequencies have been allocated . . ." (Government Brief, p. 48).[2]

In such communities, the only need for regulation which inevitably flows from the nature of broadcasting is the

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[2] One commentator has said that:

> "In almost all radio and television markets, economic barriers to entry will come into play before the technical barriers. The economic limitations have already become the dispositive factor in the growth of radio and television stations in many, if not most, small and medium-sized markets. The barrier to entry to further stations in those areas is not the technical unavailability of frequencies, but rather the economic inability of the area to support an additional station and the unavailability of sources of programming different from that which is already being provided by the existing stations. This situation then is identical to the situation in all large mass communications media." Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67, 158-59 (1967).

To the same effect is SIEPMANN, RADIO TELEVISION AND SOCIETY at 225 (1950):

> "More men can get into radio's domain today, and at far cheaper cost, than into the newspaper world."

See also THAYER, LEGAL CONTROL OF THE PRESS 126 (1956); Sullivan, *Editorials and Broadcasting: The Broadcasters Dilemma,* 32 GEO. WASH. L. REV. 719, 756-61 (1964); *Note, Regulation of Program Content by the FCC,* 77 HARV. L. REV. 701, 705-06 (1964); *Note, The Federal Communications Commission and Program Regulation—Violation of the First Amendment?* 41 NEB. L. REV. 826, 838-39 (1962).

need that each broadcaster be assigned a specific frequency on which to operate.

The question then becomes whether, in those communities in which a selection must be made among applicants, there is anything in the nature of broadcasting which requires that the selection be based, in part, on an evaluation of the "fairness" of what the licensee has broadcast.

We submit that this conclusion does not follow from the mere fact of regulation or the necessity to choose among applicants. Faced with the necessity of granting and denying licenses the Commission could have adopted any of the following courses, among others:

1. The selection among applicants on a first-come first-served or other arbitrary basis.

2. The selection among applicants on the basis of financial ability, character, independence from outside control, or other criteria which are neutral with respect to program content.[8]

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[8] It was essentially regulations of this nature which were upheld in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) ("Chain Broadcasting" regulations designed to preserve independence of licensees from contractual arrangements limiting their freedom in program selection), *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586 (1950) (regulation against "management contracts" by which licensee surrenders control of station to third party not subject to Commission's licensing powers), and *Henry* v. *F.C.C.*, 302 F.2d 191 (D.C. Cir. 1962) (regulations designed to insure that applicant had studied needs and interests of locality for which license is sought). Similarly, *Lafayette Radio Electronics Corp.* v. *United States*, 345 F.2d 278 (2d Cir. 1965), involved a power which is neutral toward content, *i.e.*, the power to allocate frequencies to one *use* or another, and to enforce that allocation. 47 U.S.C. 303(b) and (c). The Commission action upheld in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) (rules against multiple-ownership, designed

3. The selection among applicants on a basis which, while involving some examination of program content, confines that examination to whether the programming is designed to serve some "public" interest, as opposed to serving exclusively the licensee's own private interest.[4]

4. The selection among applicants on the basis of criteria which include criteria relating to overall balance among program categories.[5]

5. The selection among applicants on the basis of criteria which include program "quality".

6. The selection among applicants on the basis of criteria which include "fairness" in programming.

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to avoid excessive concentration of ownership of broadcasting facilities) and *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266 (1933) (power of Commission to delete existing station to attain equitable distribution of radio facilities among various states) were similarly neutral toward the program content of applicants' broadcasts.

[4] It was upon this basis, rather than any criteria related to the "fairness" of the applicant's overall programming, that several of the cases relied on by the Government were decided: *e.g.*, *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dism.*, 281 U.S. 706 (1930); *Chicago Federation of Labor*, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930); *Young People's Ass'n for Propagation of the Gospel*, 6 F.C.C. 178 (1938); and *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F.2d 670 (D.C. Cir. 1931).

[5] It was the Commission's power to consider, in a general way, the *types* or *categories* of programs of applicants, which was sustained in *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F.2d 351 (D.C. Cir. 1949) and in *Bay State Beacon, Inc.* v. *F.C.C.*, 171 F.2d 826 (D.C. Cir. 1948). No consideration of the specific content of the licensee's programming, such as that required under the "fairness" doctrine, was involved in those cases.

7. The enforcement of a requirement of "fairness" by the adoption of the personal attack and political editorializing rules and the imposition of sanctions for failure to comply.

Each of these degrees and kinds of regulation places a burden of a different degree and kind on free expression. Going down the list they increasingly raise the risk of governmental censorship of the press. They increasingly threaten the sensitive area of political discussion and debate. The fact that regulation is necessary does not tell us which course the Commission should follow nor does it tell us that the burdens on, and dangers to, a free press, which alternatives 6 and 7 involve, are consistent with the First Amendment.

Nor is the Commission helped by anything said or decided in *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), or *Associated Press* v. *United States,* 326 U.S. 1 (1945). In the *NBC* case this Court held only that the Commission could act against certain economic arrangements which might have deprived the individual licensee of the power to choose the programming for his station. On the free speech point the Court said only that the fact of licensing, and economic regulation of this sort, were not unconstitutional. Similarly, in the *Associated Press* case, the Court held only that newspapers were not exempt from the antitrust laws and could not, by anti-competitive arrangements, drive others of their number out of business. Despite its extensive quotation from Judge Learned Hand's opinion in the lower court, the Government has missed the nub of it:

> ". . . the mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, *so long as he remains unfettered in his own selec-*

tion of what to publish" (52 F. Supp. at 374) (emphasis added).

This Court's recent decision in *Shuttlesworth* v. *City of Birmingham,* 37 U.S. Law Week 4203 (March 10, 1969) is very much in point. The Court there held unconstitutional a municipal ordinance which allowed licensing officials to grant or deny licenses for parades or demonstrations in public places under broadly worded language which would have allowed them to affect or regulate the content of what was expressed. The regulation of parades in public places is something which the government may clearly do. This Court held, however, that it did not follow from the fact of licensing that the licensing could be based on criteria which might have an impact on the content of the ideas communicated.

We submit that pointing to the fact of regulation and licensing does not solve the problem. It does not demonstrate that the regulation which the Commission has undertaken here is either necessary, desirable or constitutional.

2. Broadcasting Cannot Be Distinguished From Other Media on the Ground That Diversity Is Lacking

One of the striking features of the Government's Brief is the paucity of evidence cited in support of the vital factual premises on which its argument is based. No evidence is cited for the proposition that the public is not now receiving, or would not receive without the "fairness" doctrine and the personal attack and political editorializing rules, a sufficiently diverse diet of information and opinion. No evidence is cited for the Government's assurance that today's marketplace of ideas is "increasingly one for the affluent and powerful." No evidence is cited for the propo-

sition that there is less diversity of information and opinion available now than there was thirty, or one hundred, years ago. No evidence is cited for the proposition that our system of self government is threatened by a spate of personal attacks, political editorials, and unfair treatment of issues whereby the media, or some of them, have molded the public to their view on vital issues. The Government takes all of these propositions as given, *a priori*.

All of the available evidence suggests that the facts are contrary to the picture which the Government paints of them.

The Government's argument ignores, first, the facts as to the existing and growing diversity and multiplicity in broadcasting. Second, it ignores the facts as to the interaction of broadcasting with other media and its place in the process of opinion development.

The Government relies heavily on the factual assertion that frequency limitation impels the imposition of the controls at issue here and indeed concludes at pages 48-49 of its brief that:

> ". . . The basis for congressional regulation of radio remains essentially the same as was the case when this Court examined the matter in *National Broadcasting Co.* v. *United States* . . . ."

We point out elsewhere (p. 14) that the *NBC* case was not at all concerned with the "matter" before the Court now.

For present purposes, however, it is significant that the conclusions reached by the Court in the *NBC* case in 1943 were in part based upon a 1938 Commission study which

revealed that at that time some 660 commercial broadcasting stations were in operation in the United States (319 U.S. at 197). The Commission's Report showed that there were then only 475 unlimited time broadcasting stations.[6] It is instructive to compare that figure with the statistics today.

As of January 31, 1969 there were some 6,560 AM and FM radio stations operating in the United States.[7] In addition to the radio stations there were a total of 851 television stations in operation.[8] Thus, there are now some 7,411 operational broadcast outlets in the United States as against the 660 outlets in 1943.[9] In addition, more than 1,000 UHF and VHF television channels, and another 1,000 FM radio frequencies have been allocated to communities, but are not being utilized.[10] It is true that unused TV channels are more prevalent outside the great metropolitan

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[6] Report on Chain Broadcasting, FCC-Dkt. No. 5060, May 1941, p. 31.

[7] FCC News Release, Feb. 20, 1969.

[8] *Ibid.* The FCC's Annual Report for the Fiscal Year ending June 30, 1967 showed the following comparisons between stations on the air in 1949 and stations on the air in 1967:

	1949	*1967*
Commercial TV	69	626
Educational TV	0	127
Commercial AM	2006	4135
Commercial FM	737	1708
Educational FM	34	318

[9] Far from the Government's conclusion that the factual basis for regulation remains essentially the same as it was in 1943 we find that the commercial outlets viewed by this Court in 1943 comprise only 9% of the broadcast outlets operating now.

[10] These allocated but unused frequencies are scattered all across the country. A comparison of the number of television frequencies

centers. It is also true, however, that the metropolitan centers are best supplied with diverse sources of information, so that any technological limit on the number of channels in such areas is unlikely to result in a deficiency of sources.[11]

Compared with this multiplicity in broadcasting there were in 1965 only 1,751 daily newspapers in this country, and the number has been declining for the last several decades.[12]

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allocated with the number authorized in some representative states is as follows:

	Allocated	*Authorized*
California	102	72
Illinois	53	35
Kentucky	33	26
Massachusetts	23	16
New Jersey	13	10
Virginia	41	23

FCC Current Table of Assignments.

Many of the frequencies which are authorized to applicants are not yet operational, so that the number of stations presently operating is, in most cases, less than the number authorized.

[11] It is worth noting that scarcity, if it is relevant, was much more of a factor when our Constitution was adopted than it is today. Printing presses were few in number and expensive, and metal type, inks, and paper usually had to be imported from Europe. It is estimated that in 1776 there were only 41 newspapers in all the colonies. In 1775 there were only 4 newspapers in New York and 2 in Virginia, all of them weeklies. NORTH, THE HISTORY AND PRESENT CONDITION OF THE NEWSPAPER AND PERIODICAL PRESS OF THE UNITED STATES (TENTH CENSUS OF THE UNITED STATES, VOL. 8 (1884)); CHENERY, FREEDOM OF THE PRESS 142 (1955). Moreover, during this early period the few best newspapers were grouped around the seaports and "the inland papers were only copies of those of the seaports. . . ." FAY, NOTES ON THE AMERICAN PRESS AT THE END OF THE EIGHTEENTH CENTURY 21 (1927).

[12] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966, 519, 523 (87th ed.).

This diversity in broadcasting also exists in particular communities, as shown by the two tables below covering a number of representative States and metropolitan areas.[18]

There is, in fact, an even greater diversity and multiplicity of broadcasting sources, both absolutely and in comparison with the number of newspapers, than is revealed by the bare figures as to the numbers of stations located in any

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[18] It should be noted that the following figures are based on sources published several years ago; the present number of broadcasters is significantly larger.

	Daily Newspapers	*Broadcasting Stations*	*AM*	*FM*	*TV*
California	128	373	223	116	34
Florida	47	239	181	41	17
Illinois	83	197	118	59	20
Maine	9	43	32	5	6
Nebraska	19	64	41	10	13
New York	85	240	149	66	25
South Dakota	12	38	26	2	10

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966, 519, 523 (87th ed.).

A similar situation is found to exist when comparable figures for the five largest metropolitan areas in the United States are examined:

	1960 Population	*Daily Newspapers*	*Broadcasting Stations*	*AM*	*FM*	*TV*
New York	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

In each instance the area referred to is the appropriate Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census. The figures are compiled from U.S. BUREAU OF THE CENSUS, COUNTY AND CITY YEARBOOK: 1967, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACTBOOK, 1966.

particular community. An analysis of the situation in the New York metropolitan area is instructive.[14] In that area there are 21 English-language daily newspapers,[15] compared to 9 television stations and 70 AM and FM radio stations. All of the television stations, and a great many of the radio stations, can be received throughout the area; but many of the 21 daily newspapers have only a small or very local circulation. Of the nine dailies which are published in the five counties which make up New York City, only three (the *Times*, the *News*, and the *Post*) are of general circulation in the metropolitan area; the other six are published in one or another of the five city boroughs and have a circulation essentially local. The other twelve dailies are published outside of New York City, and consist of nine published in Westchester County, one in Rockland County, and two on Long Island. Each of these is the only daily in a "one-daily" town or city; and each of them has essentially a local circulation.[16] It is quite evident that broadcasting stations, far from being "scarce", are far more numerous than the daily newspapers, and present a far greater number of "voices" to the public.

Even a community with only a few stations may be within the service area of many other stations, some of which may be sufficiently a part of the same locality to provide local news and information. Red Lion, Penn-

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[14] The following discussion is based on the New York Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census, which includes New York City, Nassau, Suffolk, Westchester and Rockland Counties.

[15] This includes only general coverage newspapers and excludes specialized publications.

[16] Compiled from EDITOR & PUBLISHER YEARBOOK, 1966 and BROADCASTING YEARBOOK, 1966.

sylvania, the town involved in the other case involving the "fairness" doctrine now before this Court, provides a useful example. Red Lion is a town of 5,594 inhabitants, about 10 miles southeast of York, the county seat, 25 miles southeast of Harrisburg, and 17 miles southwest of Lancaster. While Red Lion has only one radio station, according to station maps it can receive television broadcasting from 8 television stations, 3 of which are located in York and Lancaster,[17] and from some 23 radio stations,[18]

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[17] The stations are as follows:

WSBA-TV, ch. 43, York, Pa., CBS.
WLYH-TV, ch. 15, Lancaster-Lebanon, Pa., CBS.
WGAL-TV, ch. 8, Lancaster, Pa., NBC.
WHPA-TV, ch. 27, Harrisburg, York, Lebanon, Pa., ABC.
WHP-TV, ch. 21, Harrisburg, Pa., CBS.
WBAL-TV, ch. 11, Baltimore, Md., NBC.
WMAR-TV, ch. 2, Baltimore, Md., CBS.
WJZ-TV, ch. 13, Baltimore, Md., ABC.

(1968-69 Edition No. 38 of TELEVISION FACTBOOK, Stations Volume.) This analysis has not been done with engineering accuracy, but is believed to be a reasonable appraisal.

[18] The stations are as follows:

WNOW, 1250 kc, York, Pa.
WORK, 1350 kc, York, Pa.
WSBA, 910 kc, York, Pa.
WHVR, 1280 kc, Hanover, Pa.
WDAC-FM, 94.5 mc, Lancaster, Pa.
WGAL, 1450 kc, Lancaster, Pa.
WGAL-FM, 101.3 mc, Lancaster, Pa.
WLAN, 1390 kc, Lancaster, Pa.
WLAN-FM, 96.9 mc, Lancaster, Pa.
WCBM, 1460 kc, Harrisburg, Pa.
WCBM-FM, 99.3 mc, Harrisburg, Pa.
WFEC, 1400 kc, Harrisburg, Pa.
WHP, 580 kc, Harrisburg, Pa.
WHYL, 960 kc, Carlisle, Pa.
WHRY, 1600 kc, Elizabethtown, Pa.
WAHT, 1510 kc, Lebanon, Pa.
WLBR, 1270 kc, Lebanon, Pa.
WLBR-FM, 100.1 mc, Lebanon, Pa.
KYW, 1060 kc, Philadelphia, Pa.

8 of which are located in York and Lancaster. In addition, no less than three companies have applied for CATV franchises in Red Lion itself.[19]

Another factor which needs to be taken into account is the increased and increasing geographical fluidity in our society. Today's ease of travel and population mobility are another force working against the localism or parochial point of view which might be fostered by any insufficiency of information sources in a particular locality. The individual communities of our country are no longer, if they ever were, surrounded by walls impenetrable to the passage of truth.

The diversity which already exists is rapidly increasing. Technological advancements such as satellite stations and translators (which retransmit the programming of television stations) and CATV systems are multiplying the diversity of information sources available in communities across the country day by day.

The only statistical or other data advanced by the Government in the face of this diversity is data with respect to the number of comparative hearings in 1967 in the broadcast field. First of all, 73 comparative hearings in a year in all of broadcasting, when there are more than 7,000 stations operating, is not a very significant number.

In any event, the statistic does not suggest that there is any lack of diversity, but only that, in some areas, more

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WCAU, 1210 kc, Philadelphia, Pa.
WIBG, 990 kc, Philadelphia, Pa.
WRCP, 1540 kc, Philadelphia, Pa.
WBAL, 1090 kc, Baltimore, Md.
(1968 BROADCASTING YEARBOOK, Section B.)

[19] 1968-69 TELEVISION FACTBOOK, Services Volume, p. 500a.

people want to operate broadcast facilities of a particular kind than can.

The other arguments which the Government makes can be quickly disposed of. They are all qualitative, rather than quantitative, and none is supported by any statistics, data, or other hard facts.

The Government first argues (Government Brief, p. 45) that it is improper to compare numbers of broadcasters with numbers of newspapers since this ignores "the great number—and wide circulation—of printed materials other than daily newspapers, such as weekly newspapers, magazines and books." The Government suggests no reason, however, why the diversity existing in these other media argues against regulation of the content of newspapers, but does not argue against regulation of the content of broadcasts. We agree that there is great diversity in these other media. We do not agree with the Government's unspoken—and unproved—assumption that such other media do not reach the broadcasting audience. As we shall show (pp. 27-30) the Government here, and elsewhere, falsely assumes that the broadcast audience is somehow isolated from all other forms of human communication.

The Government next argues that regulation is justified because "in the case of most television and much radio broadcasting the programming received by the public, however many stations it may be tuned to, emanates primarily from a handful of network sources" (*Ibid.*). It is odd for the Government to attempt to justify the regulations and the Commission's policy on such a basis when the Commission made no findings on the point and did not even suggest that this was a reason for the adoption of its rules, and when the rules are so drawn as to apply across

the board to every station licensee, whether he be a network affiliate or an independent station, and whether he is in a market with 20 other outlets or two.

It is also an odd justification for the regulations in the face of the argument, by *amici* supporting the Government, that "fairness" doctrine complaints against networks are "extremely rare" [20] and that an examination of all complaints from July 1, 1965 to June 30, 1966 indicated that "almost all the complaints were against local programming." [21] Indeed, that brief concludes that "all reported cases involving Fairness Doctrine complaints (including personal attacks) were against local stations, none of which was in a major market." [22] It is obvious that the regulations were not designed to meet a problem arising out of networking.

Finally, the Government is fundamentally wrong in suggesting that network operations diminish the diversity available. Prior to the advent of radio and television broadcasting the people in our country relied for their local news principally on their local newspapers and for their national and international news principally on the wire services, A.P., U.P., and I.N.S., and the reporting staffs of those national magazines and newspapers strong enough to maintain them.[23] The advent of radio and tele-

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[20] *Brief of Office of Communication of the United Church of Christ, et al.*, p. 12.

[21] *Ibid.*

[22] *Id.* at 12-13.

[23] Most newspapers in the country rely, for their national and international news on a single wire service. In 1962 after I.N.S. had been absorbed into U.P., 70.2% of American daily newspapers took only one service. 41.5% took A.P.; 28.7% took U.P.I. and,

vision made available to the public a greater diversity of local news sources since each local broadcasting station develops and presents its own local news programming. As to national and international news, the large news organizations maintained by the three networks now supplement, and compete with, the wire services and national magazines as sources of such material. Since it is beyond the capacity of the typical local station to maintain the staff and facilities for national and international news coverage, they would, without the networks, be compelled to rely on the same sources the newspapers use, *i.e.*, the wire services. Thus, the existence of the networks and their news organizations multiplies the national and international news sources available in the communities across the country, rather than diminishing them.

When our Constitution was written the availability of news from distant places was limited by the cost and difficulty of travel. It was necessary to rely for news of distant events on the few people who had the time and money and reason to go to distant places. Today the avail-

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of the remainder, 4.4% took neither. RUCKER, THE FIRST FREEDOM (1968), p. 68. Rucker goes on to say:

> "Unfortunately, only 16.4 per cent of the dailies receive a service other than AP and UPI. And most of these are large dailies which also receive both AP and UPI. The New York Times Service has one hundred subscribers, the Chicago Daily News more than seventy. None of the other approximately forty-five supplemental news agencies serve as many as sixty dailies. The only foreign world news service received by more than one or two newspapers is Reuters, with forty-one subscribers.
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> "Obviously, large segments of the population rely on AP or UPI for their picture of the world. Their newspapers and their broadcasting stations subscribe to no alternate source of nonlocal news." (*Ibid.*)

ability of news of distant events in our increasingly complex world is limited by the cost of collecting, organizing and presenting it. There are only a limited number of organizations capable of performing that task. It does not follow, however, in either situation that the persons or organizations who bring news from a distance should be brought under governmental control of the content of the news they provide.

The Government next argues that, because of the physical limitations on the service area of each broadcasting station, viewers are restricted to a small number of stations, whereas there are no such limits on the circulation of printed material (Government Brief, p. 45). This merely ignores the facts as to the number of outlets, already cited, and disregards the fact that any given publication, particularly in the case of local newspapers, only reaches a limited audience in spite of the fact that there is no law of nature which prevents its wider distribution.

It is difficult to understand what the Government is attempting to deduce from its reference (p. 46) to the limited broadcast day. The fact that the broadcast day does have finite limits, unlike the size of a newspaper or other periodical, does make more difficult the broadcaster's problem of selecting among competing materials. This, however, makes governmental control or compulsion more, not less, onerous and dangerous. Every idea or datum which the broadcaster is compelled to express displaces something else that he might have expressed. In such a context the compulsion of expression automatically produces a suppression of expression. The broadcaster, unlike the newspaper publisher, cannot merely print another page.

In sum, none of the arguments advanced by the Government contradicts the plain facts that there is enormous diversity and multiplicity in broadcasting.

3. Broadcasting Must Be Considered in the Context of the Communications Complex

Broadcasting is not a phenomenon that exists in isolation. People who watch television and listen to the radio also read newspapers, magazines and books, see signs and posters and picketers and demonstrators, and talk to their friends and associates. The Government tries very hard to ignore this simple fact.

We do not undertake to demonstrate in detail that, if we include media other than broadcasting, there is an enormous diversity of expression in this country. The Government concedes as much when it refers to "the great number" and "wide circulation" of printed materials of all kinds. Each of us is aware from his own experience of the variety of information and opinion, of almost every kind and every point of view, available at small expense through the mail and at the newsstands and paperback book counters across the country. The Commission made no finding and heard no evidence that such material does not reach and affect the broadcast audience. The Government's Brief ignores the question. The fact is that the various media and modes of expression constitute a continuum, not a series of discrete categories of expression each reaching a separate isolated audience.[24]

The Court of Appeals for the Seventh Circuit correctly observed that:

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[24] *E.g.*, Blumer, *Suggestions for the Study of Mass-Media Effects* (Chapter 10 of BURDICK & BRODBECK, AMERICAN VOTING BEHAVIOR (1959)), at pp. 199, 208.

> "Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication." (400 F.2d at 1020)

The Government's image of broadcasters as pumping stations pouring information into receptive, but otherwise empty, minds vastly oversimplifies and misconceives the process by which public opinion is formed in this country. Studies which have been made of the matter suggest that neither broadcasting nor the mass media in general are as dominant a force in shaping opinion in this country as the Government suggests, and that, to the extent that they do shape opinion, it is by far less direct a process than the Government's image would indicate.

The study of opinion formation is by no means an exact science. There is, nevertheless, considerable evidence that the formation of personal opinions is much more affected by interpersonal private communications among friends and acquaintances than by the mass media.[25] As V. O. Key pointed out in a recent study, the idea that the public is "a plastic to be molded by the masters of the media into almost any form they desire" contains "a generous component of buncombe." [26]

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[25] KATZ & LAZARSFELD, PERSONAL INFLUENCE (1955), p. xv (Foreword by Elmo Roper) and see *id.* at p. 3; Berelson, *Communications and Public Opinion* in SCHRAMM, MASS COMMUNICATIONS (1960), pp. 531-32.

[26] KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961), p. 344.

Not only are there many other forces at work, but even the effect that the media do have is largely an indirect one involving the diffusion of information from the media and other sources through individuals and groups in our society. Particularly important in the operation of the mechanism of opinion formation are those whom Key describes as "political activists" or "attentive publics" as opposed to "inattentive publics." These persons and groups who are catalysts to opinion formation, by their very nature, seek out information from many sources, rather than relying on a single one.[27]

The point was well stated by Professor Jaffe in a paper submitted to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce:

> "Closely related to the notion of TV's uniqueness is the notion of what I would call its autonomy. This is the notion—more or less resting on its uniqueness—that TV is not simply a part of the whole complex of communication. It is thought to be separate, a complete system of communication in itself, in the sense that it has an audience which is reached primarily, even exclusively, by it. A large mass of TV and radio listeners are conceived as insulated from other channels of communication. It is supposed that they do not read newspapers, magazines, or books and, it would seem, do not receive information informally from their friends, associates, or organizations. Thus, if an attack on the personal honesty of a reporter is broadcast, it is assumed that unless a defense is subsequently broadcast the listener will not otherwise receive any counter-communication.

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[27] *Id.* at 535-58.

> "In the absence of more precise information than I have, I can only speculate as to its validity. *I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.* My questions go, of course, only to degree. Undoubtedly there are insulated listeners but what I question is that the typical listener is thus insulated, that is to say, that he hears and knows only what is broadcast." [28]

It is evident that broadcasting cannot be viewed in isolation. The communications complex, taken as a whole, disseminates a great diversity of information and points of view, from a multiplicity of sources.

B. *The First Amendment Guarantees a Free Press, Not Governmentally Regulated Access to the Press*

One of the recurring themes of the Government's Brief is the idea that what the First Amendment mandates is not that the press be free, but that access to the press be somehow governmentally secured. (*E.g.*, Government Brief, pp. 38, 42). Thus, the Government argues that what the Commission is doing is to "protect the public's interest in the use of the available channels of communication" and that is a "clearly appropriate implementation of the First Amendment's basic purpose" (Government's Brief, p. 52).

The Government's argument distorts beyond recognition traditional concepts of the free press. It turns constitutional theory upside down. The history of the development and interpretation of the constitutional guarantee of freedom of the press makes it perfectly clear that the

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[28] Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change*, at pp. 2-3 (U.S. Government Printing Office 1968) (emphasis added).

First Amendment contemplated that the press would be free and independent, not that the government would regulate access to it.

The press was selected along with the rights of assembly, petition, and free speech, as a separate instrument of popular government the vitality of which should be protected in the interest of effective self government. Professor Meiklejohn has said that the First Amendment:

> "... correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation, beyond even the due process of law." [29]

Jefferson's appreciation of the importance of the role performed by the press led him to say that:

> "... were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." [30]

The concept of a free press which was forged out of the colonial and revolutionary experience, and which was embodied in the brief phrase "Congress shall make no law ... abridging the freedom of ... the press," was the concept of a press unfettered and capable of acting as a positive and independent force, one of whose principal

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[29] MEIKLEJOHN, *Free Speech in Its Relation to Self Government*, reprinted in POLITICAL FREEDOM (1960), p. 37.

[30] Letter from Thomas Jefferson to Edward Carrington, January 16, 1787, in *The Papers of Thomas Jefferson*, ed. Boyd, XII, 48-49 reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, ed. LEVY (1966) p. 333.

functions would be to serve as an outspoken critic of, and check upon, the activities of the government and those public men and groups who governed and shaped the Nation's life.

It was, of course, recognized that a press free of restraint might, on occasion, be licentious, dishonorable or unfair and might, at any given moment, communicate what was useless or dangerous rather than what the public needed to know. The Framers were alive to this danger but they thought that the benefits of an unfettered press were worth this risk. In Madison's words:

> "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press." [31]

In his reply in 1798 to a letter from Talleyrand protesting against the pamphlets printed in the United States containing "insults and calumnies" against the French Government, John Marshall said:

> "Among those principles deemed sacred in America, . . . there is no one . . . more deeply impressed on the public mind, than the liberty of the press. *That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn.*" [32]

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[31] 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (1876), p. 571.

[32] II BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919) pp. 329-30 (emphasis added).

Jefferson made the same point:

> "... the abuses of the freedom of the press here have been carried to a length never before known or borne by any civilized nation. But it is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood." [33]

There are two views which might be taken of the role of the government with respect to the press in a free society. One view is that the government should regulate the press in such fashion that it serves as a platform for all voices that wish to be heard. The difficulties with such a view, among others, are that it places the government in a position to control, either overtly or subtly, the information and views which are disseminated by the press to the public and that it seriously impedes the press in the performance of its active and independent role in criticizing public and private action.[34]

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[33] Letter of Thomas Jefferson to Monsieur Pictet, February 5, 1803, in *The Writings of Thomas Jefferson*, ed. Lipscombe and Bergh, X, 357 reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, ed. LEVY (1966) pp. 360-61.

[34] A substantial body of case law has held that there is no right of access to the press. In *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), which involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station, the court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action and stated:

> "Assuming arguendo that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of

The second view, and the one undoubtedly enshrined in the Constitution, is that the safer and better course is to deprive the government of any power to control and regulate the press, particularly with respect to reporting or comment which might affect political, social, and economic judgments.

This Court has frequently recognized that the role contemplated for the press was an active one, that it was to be not merely a conduit of information or views, but a critic and gadfly. It was viewed as one of the independent but interacting forces which would combine to ensure a government responsive to criticism and reflective of the will of the people. Mr. Justice Black eloquently confirmed the active and independent function of the press in *Mills* v. *Alabama*, 384 U.S. 214 (1966):

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the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind." (151 F.2d at 601)

Accord, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *Bloss* v. *Federated Publications, Inc.*, 5 Mich. App. 74, 145 N.W.2d 800 (1966); *Lord* v. *Winchester Star, Inc.*, 346 Mass. 764, 190 N.E.2d 875 (1963), *cert. denied*, 376 U.S. 221 (1964); *Commonwealth* v. *Boston Transcript Company*, 249 Mass. 477, 144 N.E. 400 (1924); *Shuck* v. *Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *Mack* v. *Costello*, 32 S.D. 511, 143 N.W. 950 (1913); *Approved Personnel, Inc.* v. *Tribune Co.*, 177 So.2d 704 (D.C. App. Fla. 1965); *Friedenberg* v. *Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. Orange Co. 1954).

"... the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as *a constitutionally chosen means* for keeping officials elected by the people responsible to all the people whom they were selected to serve. *Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.*" (384 U.S. at 219) (emphasis added).

In the *Mills* case, the Court invalidated a statute prohibiting the publication of editorials on election day urging people to vote in a particular way as to the candidates or issues presented to them. The same argument was made in support of that statute that has been made in support of the FCC's rules, *i.e.*, that it promoted fairness by preventing publication of views in circumstances in which they could not be effectively answered. In the *Mills* case the Court found such a justification insufficient to support encroachment on the freedom of the press.

A praiseworthy motive, or even a desire to promote diverse speech, will not justify regulation of the content of what is disseminated by the press. In commenting on proposals that it regulate programming by requiring that specific types of programs be presented, the Commission itself recognized at a different time:

"With respect to this proposition we are constrained to point out that *the First Amendment forbids governmental interference asserted in aid of free speech as well as governmental action repressive of it.* The protection against abridgement of freedom

of speech and press flatly forbids governmental interference, benign or otherwise." [35]

The cases relied on by the Government as supporting the power of Congress, or its agency, to "implement a rather general right of access on behalf of elements of the public whose ideas might not otherwise be promulgated" (Government Brief, p. 57, n. 28) are singularly inapposite. In all of them, this Court struck down governmental action attempting to regulate free expression. In *Schneider* v. *State,* 308 U.S. 147 (1939), the Court invalidated municipal ordinances regulating the distribution of handbills. In *Martin* v. *Struthers,* 319 U.S. 141 (1943), the Court struck down a municipal ordinance prohibiting the distribution of handbills directly to a home. In *Staub* v. *City of Baxley,* 355 U.S. 313 (1958), the Court held unconstitutional a municipal ordinance regulating the solicitation of membership for organizations. In each case, the Court emphasized the danger of setting government officials astride any medium of communication. For example, in the *Schneider* case the Court held unlawful what it described as the "bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information . . ." (308 U.S. at 164). In the *Staub* case the Court found the municipal ordinance unlawful because it made free expression "contingent upon the will of the Mayor and Council of the City . . ." (355 U.S. at 325). It is evident that these

[35] Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, FCC Public Notice B, July 25, 1960, as reprinted in "Television Network Program Procurement," Report of the Committee on Interstate and Foreign Commerce, H.R.Rep. No. 281, 88th Cong., 1st Sess. (1963), pp. 157, 162 (emphasis added).

decisions condemn, rather than support, the policies of the Commission which are at issue here.

The government consistently misses the important distinction between the desirability of divergent views having access to the media of expression and the propriety of permitting government officials to regulate such access. As this Court again, quite recently, reaffirmed, the government "may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare', 'decency' or morals of the community." *Shuttlesworth* v. *City of Birmingham,* 37 U.S. Law Week 4203, 4204 (March 10, 1969).

It is noteworthy that in a comprehensive brief the Government says so little about the impact of the Commission's policy on the *freedom of the press.* The Government devotes much attention to the right of free speech and the way in which the Commission's policy allegedly implements it. The Government fails, however, to consider the right of freedom of the press, a distinct right, also separately guaranteed by the First Amendment.

Perhaps the Government intends to dispose of the issue by its suggestion that "the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media." (Government Brief, p. 53). That of course is true, but it does not meet the point. The First Amendment recognizes that it is *in the public interest* that *the press* be free. The purpose is, of course, not to protect the freedom of action of the press for its own sake; rather,

the First Amendment recognizes that the public will be served if there is a free and independent press active as a force in our society. Such a press serves a function which is not served by merely insuring that every private individual may speak his mind. Just as the right of assembly insures the right of individuals to gather together so that their collective voice may be more strongly heard, and the right of petition insures that individuals or groups may make demands upon their government, so the guarantee of a free press insures that there will be groups in our society, beyond the control of government, with the facilities and resources to arrive at their view of the truth and speak loud enough for all, or many, to hear.

Although the Government purports to base its argument on the need to increase the public's access to information, in the name of free speech, its thesis, if accepted, would work a fundamental change in this Court's approach to free press issues. What the Government is suggesting is that the structure of our society has altered so fundamentally since 1789 that the government must now supervise the selection by the press of what it will publish, a power which the Framers certainly never intended the government to have, and which this Court has consistently denied it.

That this is the real import of the Government's Brief can be seen from its prominent reliance upon the thesis of Professor Barron[36] and its admission at page 57 of its Brief that the "fairness" doctrine and rules in contest here are "at most an application of the notion [Barron's thesis] to the field of broadcasting . . . ."

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[36] Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

Barron thoroughly disagrees with the Government's position that broadcasting may be regulated in a way in which the other media may not. He notes that there are many more broadcasting stations than newspapers and that the need for regulation is not diminished as to newspapers because the limitation on their number is economic rather than technological. He therefore concludes that newspapers should be viewed as "impressed with a public service stamp." [37]

Barron argues that because, in his view, the public is not getting access to enough of the right kind of information there must be some governmentally sanctioned right of access to the press—both broadcasting and printed. He recognizes that this view is flatly contradictory to the view which this Court has consistently taken, which he characterizes as "romantic".[38] He reserves particular criticism for this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) as being wholly inconsistent with his views.

There can be no doubt that Barron is arguing for a radical change in this Court's approach to free press questions. The Government, in order to sustain its position, is driven to the endorsement of Barron's view, or something approximating it.

Also revealing is Barron's approach to the crucial question of what he refers to as the "administrative feasibility" of the remedy he would like to see created. He suggests that the right to a judicially enforced access to the press should depend on such criteria as whether "the peti-

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[37] *Id.* at 1666.

[38] *Id.* at 1642, 1643 and *passim*.

tioner seeking access represents a significant sector of the community" and whether "the material for which access is sought is indeed suppressed and underrepresented by the newspaper."[39] Professor Barron has obviously encountered the same difficulty the Commission has in attempting to find a standard clear enough for the government to use in testing the editorial judgments which the press makes.

The press must inevitably decide which issues to cover, and which materials and viewpoints to present on each of them. No member of the press can present everything, especially in broadcasting, with the limited time available. Even a broadcaster who is highly sensitive to his duty of informing the public on crucial issues, and who wishes to present a balanced coverage, must decide what is "controversial" and what is of "public importance". Having decided to focus on an issue, he must decide which of the many possible viewpoints to present. This will inevitably involve value judgments. He may decide that a view is too narrowly held, or wholly irrational, or so similar to another point of view that it does not require separate expression. The Government recognizes that such judgments must be made when it refers to:

> ". . . access of the public, *or, more precisely, those elements of the public with responsible ideas warranting a general airing,* to the news media . . . ." (Government Brief, p. 56). (emphasis added)

The question is: Who shall decide whether an idea is "responsible" or whether it "warrants a general airing?" Shall it be the individual broadcasters or shall it be a

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[39] *Id.* at 1677.

governmental agency? The Commission cannot enforce a "fairness" doctrine without becoming involved in such judgments.[40]

No one claims that the judgments made by the press, either broadcasting or printed, are always right, or always fair, or always in the public interest. No one claims that the press has finally outgrown the vices and abuses of which Jefferson and Madison complained. But William Allen White has told us clearly and pungently why it is that the existence of those vices and abuses does not warrant giving up on the idea of a free press:

> ". . . bad as he is, the crookedest, rich, property-minded publisher is vastly better than he would be if he was operating under a government controlled press. For on seven sides out of ten, the most prejudiced, unscrupulous publisher is fair and his columns in those areas are reasonably dependable.
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> "In a government controlled press, nothing is fair, nothing is left to the routine professional judgment of the editor. A crooked, kept press, privately owned and operated, dominated by an arrogant, class-conscious individual or group of individuals, at its worst blinds only one eye of the public. But a government censored press blinds both eyes. . . .
>
> "At least the readers of a biased press have got the editor's number. They have taken his measure. They know how to get the truth out of his paper by discounting at a certain per cent and allowing certain dependable margins for lying. Then this biased, class-conscious editor is most enterprising in realms that do not affect his social bias and economic position.

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[40] Many people, including Commissioner Loevinger, apparently believe that it has already become involved in them. (See p. 52, *infra*.)

> After all, bad as the biased editor is, his faults are not fatal. For there are chinks in his armor of untruth through which the facts leak out." [41]

Professor Chafee, in pointing out the risks and dangers of governmental regulation of the press, has also alerted us to the fact that the Commission or body doing the regulating will not be free of political and other pressures and will be at least as fallible as the private press.[42] He goes on to say:

> "Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: 'Am I envisaging myself as the official who is going to administer the policy which seems to me so good?' Justice Holmes remarked that, when socialism came, he hoped he would be 'on the committee.' You and I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get." [43]

We question the Government's easy assumption that a governmental agency will do a better job than a free press in

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[41] WHITE, *Canons of Journalism—IX*, reprinted in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, ed. NELSON (1967), pp. 365-66.

[42] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965), pp. 707-08.

[43] *Id.* at 709.

promoting expression of the views the people need to hear and in securing, sometimes in the face of fierce pressures, the robust debate that everyone agrees is desirable.

Professor Chafee concluded that:

> ". . . free instruments and organizations seem more qualified than the state for this task of enlightenment, guidance and education." [44]

An enormous burden of proof would have to be carried to demonstrate that broadcasting and the printed media of communication have become so deficient as a mechanism for disseminating the information which the people need in a self governing society that we now need a government regulated press rather than a free press. That burden has not been carried here.

A democratic society is complex. It requires for its effective functioning the interaction of a multitude of persons, groups, and forces. An independent press is a part of that scheme. V. O. Key, a student of public opinion and its formation, has recently reaffirmed this truth:

> ". . . development and maintenance of the type of leadership essential for the operation of a democratic political order is facilitated by the existence of a social system of some complexity with many centers that have some autonomy and economic independence."

Key includes among these "centers" "communications enterprises, important in the operation of democracies," which "gain independence from government by their commercial position." [45]

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[44] *Id.* at 711-12.

[45] KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961), pp. 540-41.

There is as much need for a free press as there has ever been; the danger in compromising that freedom is as great as it ever was.

C. *The Commission's Rules Burden the Broadcast Press in a Way Which the First Amendment Does Not Permit*

We have demonstrated above that the guarantee of freedom for the press forbids any form of governmental control, overt or subtle, which impedes or discourages a broadcaster from an active and vigorous role in taking or endorsing positions with respect to political, social or economic issues, or in criticizing or praising public officials and public figures.

That the Commission's policy and rules have such an impact is evident, in spite of the Government's fervent, though unsupported, denials. (*E.g.*, Government Brief, pp. 68-69).

The precise quantitative impact of the Commission's "fairness" doctrine rulings on what is broadcast cannot, of course, be measured, and can never be measured, since we can never know for any period of time what would have been broadcast had the Commission's policy been other than it is. The distribution of programming among program categories, the content of particular programming, and the extent and nature of broadcasting on controversial issues are the results of the interaction of a multitude of social, economic, political and legal forces, only one element of which is the Commission's "fairness" doctrine.

It has never been thought necessary, however, in cases where governmental action threatens to impinge upon free

expression, to analyze nicely the precise quantum of suppression produced by the particular government practice or policy complained of. Thus, in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) the Court did not find it necessary to determine just how much communist mail would remain undelivered as a result of the requirement that a reply card be returned in order to secure delivery, and in *Mills* v. *Alabama,* 384 U.S. 214 (1966) the Court found it unnecessary to analyze precisely how much political debate would be restrained by a statute prohibiting the publication on election day of editorials relating to the issues or candidates in the election. In the latter case it was evident that the impact would be small since the statute in no way impaired debate up to and including the very eve of the election.

The inquiry has always been merely whether, as a matter of logic and common experience, a particular governmental restriction is likely to limit free expression by the public or the press in some degree.

It is evident that the "fairness" doctrine and the Commission's rules have such an effect.

The very purpose of the Commission's policy is to affect and control the content of what is broadcast. To the extent that the doctrine is enforced by the Commission it forces some broadcasters to refrain from broadcasting certain material because they are unwilling to broadcast other material which the "fairness" doctrine would require to be presented. It forces other broadcasters to broadcast material which they would not otherwise have presented. The penalties for failure to comply are the threat of fines and forfeitures and the ultimate weapon of license denial.

The form of regulation which the Commission has attempted here is precisely the kind of regulation which this Court struck down in *Near* v. *Minnesota*, 283 U.S. 697 (1931). There an attempt was made to suppress future publication of a newspaper as a public nuisance because it had consistently published defamatory material and was "largely" or "chiefly" devoted to such material. This Court held that, if the publisher had the right to publish the prior editions, without previous restraint, he had the same right to continue such publication in the future. The Court went on to say: "If the publisher has a right, without previous restraint, to publish . . . [the material], *his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.*" (283 U.S. at 720) (emphasis added). Those words could have been written about the Commission's "fairness" doctrine.

Where a rule or policy is specifically directed at securing a result which the First Amendment proscribes, no additional showing of burdensomeness or repressiveness should be necessary. It is perfectly clear, however, that the "fairness" doctrine, and particularly the implementing rules here under attack, will, if enforced by the Commission, impose substantial burdens on free expression by the broadcast press.

Some of the obvious effects of the FCC's enforcement of its rules are as follows:

1. *The Rules Discourage Radio and Television Broadcasters from Dealing with Controversial Issues of Public Importance.*[46]

It is obvious that many, if not most, programs dealing with issues of a controversial nature involve, either directly or inferentially, attacks on individuals or groups who are involved in or have taken positions with respect to those controversies. If a personal attack occurs, the licensee must incur the administrative burden and expense of making and sending transcripts or summaries to those attacked; he must disrupt his program schedule by providing time periods for any necessary replies; he must suffer the financial penalty of donating time on his facilities; and he must incur the risk that whatever action he takes, the FCC may subsequently conclude, either that there was a "personal attack" in material he thought inoffensive, or that his compliance with the rule has been inadequate. A further risk is that a communication advising an individual that he has been "personally attacked," and offering reply time, may invite, if it does not affirmatively support, a libel action based on the controversial issue broadcast.

It is apparent that the safer course is to avoid broadcasts involving controversial public issues. The dampening effect of the Commission's policy on broadcasters' attention to public issues has been recognized by a recent commentator after a careful study (McMillin, *New Voices in a Democracy*, 3 TELEVISION QUARTERLY 27, 41-8 (1964)), and by members of Congress.[47] Thus Mr. McMillin quotes a let-

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[46] This point is more fully developed, with many specific examples, in the Brief submitted in behalf of Respondent, CBS.

[47] That the equal time provision of Section 315 has had such an effect was acknowledged by the Senate Committee on Inter-

ter from Representative Oren Harris asking rhetorically "Will not broadcasters want to avoid starting an interminable chain of argument and debate?" (*Id.* at 48). The Government cannot deny that, in the light of the Commission's policy, the safer course is to avoid controversial issue broadcasting.

2. *The Rules Will Require Broadcasters Themselves To Impose Rigorous Censorship on Those Who Appear on Their Programs.*

Since the broadcaster is accountable, not only for his own use of his facilities to state positions, but for all material broadcast, he must carefully control what is uttered by those who appear on his station in order to insure that their utterances will not expose him to the penalties of a "personal attack" broadcast. Spontaneous discussion of a public issue, for example, will in many instances involve inadmissible risks. Even where there is a script, any copy dealing with a public issue will require careful screening. Moreover, the material to be screened out is not merely the untrue, the defamatory or the scurrilous, but anything which is in any respect critical of the "honesty, character, integrity, or like personal qualities" of a person or group. The burdens imposed by the principle are imposed irrespective of the extent to which the criticism is merited and, indeed, irrespective of whether the public interest urgently requires that the criticism be voiced.

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state and Foreign Commerce in its Report favoring a joint resolution to suspend that provision during the 1960 Presidential campaign (S. REP. No. 1539, 86th Cong., 2d Sess. (1960)), and by Congress in enacting the suspension. (Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554). For the reasons indicated in the RTNDA Brief the constitutionality of Section 315 is not here in issue.

3. *The Rules, to the Extent to Which They Are Successful in Securing Their Objective, Insure a Bland Impartiality in the Presentation of Views on Public Issues.*

Criticism is muffled by being incorporated in a total context which gives equal voice to every view.[48] Thus the official or private culprit is assured that, whatever he may do, his conduct will receive from the broadcast press a measure of adulation or explanation equal to any criticism.

4. *The Rules Will Place in the Hands of the FCC the Power, by Its Interpretations of the Rules, To Affect in More Subtle Ways the Content of What Is Broadcast by Its Licensees.*

The rules contain many words and expressions of unclear content and susceptible of various interpretations, *e.g.*, "like personal qualities," "controversial issue of public importance," "group," and the like.

The Government's Brief nicely exemplifies the vagueness of the rules. Thus, the Government says:

> "It is clear that an 'attack' is something quite different from mere mention, comment, or even criticism." (Government Brief, p. 72).

The precise dividing line between "criticism" and "attack" is not as clear to us as it is to the Government.

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[48] A criticism which has been made of broadcasters over the years is that their programming is too even-handed and neutral and that there is too great a reluctance to take positions. See, *e.g.*, Variety, November 30, 1966, p. 24; The Nation, January 23, 1967, pp. 99, 100; The New York Times, July 30, 1966, p. 53. Against this background it is anomalous for the Commission to adopt a rule mandating neutrality.

The Commission has frequently recognized in discussing the requirements of "fairness" the complexity and subtlety of the judgments which must be made in this area. Thus, in its 1949 REPORT ON EDITORIALIZING the Commission emphasized that the requirements of "fairness" might differ in different contexts and that in responding to specific requests for time the licensee would be required to weigh and balance a multitude of factors.

The Commission is inevitably required to apply this uncertain standard in highly controversial situations. A recent example is the Commission's response to the criticism of press coverage of the Democratic National Convention held in Chicago in August, 1968. Following the Convention the FCC wrote to NBC, and to the other networks, demanding that they respond to its request for comment on the "hundreds" of complaints received by the Commission with respect to the convention coverage. The Commission specifically referred to the following objections as having been made in the complaints:

> "Failure to give exposure to the views or statements of city government officials of Chicago, with respect to alleged 'brutality' by the police; and bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam." [49]

It is significant that, while many of the letters fell into these categories, the letters expressed many other points of view which the Commission did not mention in its letter. The networks responded, describing in detail their Con-

[49] Letter from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC to NBC dated September 13, 1968.

vention coverage and objecting to the Commission's intrusion into their journalistic performance and editorial judgments. Although the Commission concluded that the "fairness" doctrine had been complied with in this instance and disclaimed any intention of judging the "quality" or the "truthfulness" of the coverage, it reaffirmed its power to apply the "fairness" doctrine and to regulate what it referred to as "distorted" news.[50]

It is evident that the government's calling a journalist to task for his treatment of explosive political issues cuts to the very heart of a free press. Can a broadcaster, with the renewal of the license he needs for survival hanging in the balance, afford to provide coverage of centers of raging controversy? Can he do this when he knows that his coverage will be subject to surveillance by a Commission which is itself at the vortex of the whirling currents of public opinion, Congressional pressure, and Executive control?

The Commission's action in *Mrs. Madalyn Murray*, 5 R.R. 2d 263 (1965), provides further evidence that this problem is by no means hypothetical. In that case the Commission was requested, pursuant to the "fairness" doctrine, to direct 15 Hawaii radio stations to afford broadcast time for the discussion of atheism. The licensees argued that "free thought" was not a controversial issue in their area and that the broadcast of religious services and prayers did not raise a "controversial issue of public importance." The Commission ruled that the licensees had "acted reasonably and in good faith." (5 R.R. 2d at 264) Two Commissioners, in a separate concurring opinion, spe-

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[50] Letter from FCC to NBC, CBS and ABC dated February 28, 1969.

cifically found that the broadcasting of "church services, devotionals, and prayers" did not constitute the presentation of one side of a controversial issue of public importance. (5 R.R. 2d at 266-67) In contrasting the opinions in that case with the opinions in *Brandywine-Main Line Radio, Inc.* (WXUR), 4 R. R. 2d 697 (1965), Commissioner Loevinger said, in a dissenting opinion:

> "The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." (5 R.R. 2d at 269).

Another illustration of the fact that value judgments are inextricable from the Commission's application of its "fairness" doctrine may be found in *Tri-State Broadcasting Co.* (KTSM-TV), 3 R. R. 2d 175 (1962), where the Commission wrote to a broadcaster concerning a "fairness" complaint arising out of a program entitled "Communist Encirclement—1961". In apprising the station of its obligations the Commission said:

> "As you know, it was not and is not the intention of the Commission that you make time available to communists or the communist viewpoint. You will recognize, however, that there are varying views existent with respect to the most effective and proper method of combating Communism and Communist infiltration and that broadcasts of proposals supporting one method raise the question whether reasonable opportunity has been afforded for the expression on the station of opposing viewpoints.
>
> "Accordingly, in light of the above, you are requested to inform the Commission within twenty days of the

measures taken by you to assure compliance with the 'fairness doctrine' " (3 R. R. 2d at 176).

There are other indications that, in an industry as sensitive to the real or imagined attitudes and requirements of the regulatory agency as broadcasting is, the Commission's policy brings powerful influences to bear on the selection and emphasis of political, social and economic views by broadcasters. Thus, one commentator saw in the Commission's specific reference in its 1963 Public Notice to the "segregation—civil rights controversy" a suggestion that "the FCC was less interested in principle than in furthering administration policy." McMillin, *supra* at 36. That same writer quoted a "prominent attorney" as expressing the view "as a practical matter," that "a broadcaster is going to get into trouble if he expresses any editorial viewpoint which is displeasing to the Administration." (*Id.* at 45). When broadcasters must depend on the Commission for the license they require for continued existence, they cannot take lightly the Commission's hints and warnings. The important thing is not whether such statements accurately reflect the FCC's policy, but whether there is reason for broadcasters to believe that they do. If they do, it cannot help but influence their judgments. Once the Commission embarks on a day-by-day and program-by-program regulation of public issue broadcasting, it is difficult to dispel such fears.

CONCLUSION

No one can quarrel with the proposition that, in a democratic society, it is important that a diversity of views and information reach the public ear and that no significant point of view be denied access to the public. The question posed by this case, however, is what means are permissible to secure that end. If it is to be secured by the day-to-day supervision of the broadcast press by the government which has the power to compel it to publish particular views, or to prevent it from publishing certain views unless it also publishes others, the government becomes actively engaged in controlling what the public will hear from the press. It is precisely that risk which the First Amendment was designed to meet.

The decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	2
A. Regulatory Background	3
B. Proceedings Below	10
SUMMARY OF ARGUMENT	15
ARGUMENT	19
I. THE PERSONAL ATTACK AND POLITICAL EDITORIAL REGULATIONS ABRIDGE THE FREEDOM OF SPEECH AND PRESS GUARANTEED BY THE FIRST AMENDMENT	19
A. Broadcast Licensees Exercise Journalistic Functions Making Them Part of the Press Whose Freedom Is Secured by the First Amendment	22
B. The Challenged Regulations Seek To Govern Public Discussion of Issues at the Center of the Constitutionally Protected Freedom of Expression	26
C. The Liabilities Imposed by the Challenged Regulations "Abridge" Freedom of Expression	28
D. The Regulations Are not Justified by the Commisison's Belief That They Will Improve the "Fairness" of Broadcast Discussion	36
1. Government regulation of public affairs broadcasts, in violation of a basic postulate of the First Amendment, is not necessary to give the public access to diversity of opinion upon public issues	37

Page

2. The regulations are unconstitutional, even if the fairness doctrine is generally valid, because they inhibit broadcast debate more than necessary to secure from each licensee a fair presentation of public issues 56

II. The Personal Attack and Political Editorial Regulations Are not Authorized by the Communications Act 64

III. The Regulations Are Invalid for Lack of Specific Findings Upon Whether Access to Full and Fair Debate Would Be Denied the Public Under a Regime of Free Broadcast Expression .. 77

Conclusion 82

Appendix A 1a

Appendix B 6a

CITATIONS

Court Cases:

American Communications Ass'n v. Douds, 339 U.S. 382 .....28, 29
Aptheker v. Secretary of State, 378 U.S. 500 .....36, 64
Ashton v. Kentucky, 384 U.S. 195 63
Associated Press v. Labor Board, 301 U.S. 103 53
Associated Press v. United States, 326 U.S. 1 .....39, 46, 52, 53
Banzhaf v. Federal Communications Commission, D.C. Cir., No. 21,285, decided Nov. 21, 1968, slip op., petition for certiorari pending, sub nom. Tobacco Institute v. Federal Communications Commission, No. 1036, Oct. Term, 1968 .....21, 45
Bantam Books, Inc. v. Sullivan 372 U.S. 58 36
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 28
Brown v. Louisiana, 383 U.S. 131 51
Burstyn v. Wilson, 343 U.S. 495 20
Cantwell v. Connecticut, 310 U.S. 296 .....39, 64, 76, 79
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Page

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Curtis Publishing Co. v. Butts, 388 U.S. 130 .....26, 28
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Ex parte Endo, 323 U.S. 283 75
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Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 .....24, 38, 65
Federal Communications Commission v. WOKO, Inc., 329 U.S. 223 20
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Garrison v. Louisiana, 379 U.S. 64 .....28, 41
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Grosjean v. American Press Co., 397 U.S. 233 ....28, 31, 53
Hannegan v. Esquire, 327 U.S. 146 75
Henry v. Collins, 380 U.S. 356 28
Kent v. Dulles, 357 U.S. 116 .....75, 79
Keyishian v. Board of Regents, 385 U.S. 589 .....14, 63
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Lamont v. Postmaster General, 381 U.S. 301 ....15, 28, 29
Lorain Journal v. United States, 342 U.S. 143 53
Lovall v. City of Griffin, 303 U.S. 444 19
Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950) 66
McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3rd Cir. 1945), certiorari denied, 327 U.S. 779 .. 66
Mills v. Alabama, 384 U.S. 214 .....25, 40
Murdock v. Pennsylvania, 319 U.S. 105 .....28, 29, 31
NAACP v. Alabama, 377 U.S. 288 64
NAACP v. Button, 371 U.S. 415 36
National Broadcasting Co. v. United States, 319 U.S. 190 .....20, 51, 52
Near v. Minnesota, 283 U.S. 697 29
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Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966) 20
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Page

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Regents of the University v. Georgia, 338 U.S. 586 .. 20
Rosenblatt v. Baer, 383 U.S. 75 ..... 28, 58
Saia v. New York, 334 U.S. 558 64
Shelton v. Tucker, 364 U.S. 479 ..... 14, 64
Sherbert v. Verner, 374 U.S. 398 45
Smith v. California, 361 U.S. 147 ..... 36, 63
Speiser v. Randall, 357 U.S. 513 ..... 17, 29, 36
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Talley v. California, 362 U.S. 60 ..... 28, 29, 36
Thomas v. Collins, 323 U.S. 516 ..... 28, 29, 44
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Time, Inc. v. Hill, 385 U.S. 374 ..... 28, 58
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United States v. Carolene Products Co., 304 U.S. 144 78
United States v. Florida, 282 U.S. 194 ..... 78, 81
United States v. Paramount Pictures, 334 U.S. 131 ... 20
United States v. Robel, 389 U.S. 258 51
United States v. Storer Broadcasting Co., 351 U.S. 192 51
Watkins v. United States, 354 U.S. 178 ..... 76, 79, 81
Winters v. New York, 333 U.S. 507 34
Whitehill v. Elkins, 389 U.S. 54 63
Yonkers v. United States, 320 U.S. 685 ..... 78, 81

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Amendment of Multiple Ownership Rules, 9 P & F Radio Reg. 1563 (1953) 51
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Page

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Constitution, Statutes and Rules:

United States Constitution:
First Amendment .....*passim*

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3 .....24, 68
4 .....17, 64, 65
303 .....17, 64, 65
307 .....3, 65
309 65
310 65
312 3

Page

315 ..... 4, 8, 24, 25, 64, 72, 81
326 ..... 17, 66
502 3
503 3

Radio Act of 1927:
44 Stat. 1162 ..... 3, 67
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73.35 51
73.202 46
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Page

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H.R. 10135, 88th Cong., 2d Sess. (1964) 71
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Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

OPINIONS BELOW

The opinion of the court of appeals (R. 342a-73a) is reported at 400 F.2d 1002. The Commission's memorandum opinions and orders adopting and revising the challenged regulations (R. 209a-63a) are reported at 32 Fed. Reg. 10303, 32 Fed. Reg. 11531 and 33 Fed. Reg. 5362.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (R. 374a). The petition for a writ of certiorari was filed on November 7, 1968 and granted on January 13, 1969. The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant sections of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, are set forth in Appendix A, pp. 1a-5a, below.

The regulations under review are set forth in Appendix B, pp. 6a-7a, below.

QUESTIONS PRESENTED

1. Whether FCC regulations restricting the freedom of a radio or television station to broadcast discussion of public issues by requiring the station to give notice and furnish free time for reply to any election editorial or any personal criticism of a public figure abridge the freedom of speech and press guaranteed by the First Amendment.

2. Whether the challenged regulations are authorized by the Communications Act.

3. Whether the challenged regulations are invalid because not supported by an adequate FCC investigation and specific findings upon the necessity of the restrictions in order to make available to the public a wide diversity of opinion.

STATEMENT

This case arises upon petitions to review the so-called "personal attack" and "political editorial" regulations issued by the Federal Communications Commission on July 5, 1967, and later amended to permit limited exceptions.

The "personal attack" regulation (Appendix B, p. 6a, below) provides, in essence, that any radio or television station which broadcasts a discussion of a public issue that includes criticism of the "honesty, character, integrity or like personal qualities of an identified person or group" shall (1) notify the person or group, (2) furnish a tape or transcript, and (3) offer time to reply over the station's facilities at the station's expense. The duty is imposed without regard to the truth of the statement, or to whether the station or its employees authorized the criticism or could have prevented it. Examples of political broadcasts used by the Commission to illustrate the scope of the rule appear at R. II Supp. Exh. 75-81.

The "political editorial" regulation (Appendix B, p. 7a, below) provides that, if a radio or television station broadcasts an editorial supporting a candidate for elective office, then the station shall offer opposing candidates (or their chosen spokesmen, if the station prefers) free time for reply. If the editorial simply opposes one of a number of candidates, he must be given free time for reply.

The regulations are enforceable by both civil and criminal sanctions, including cease and desist orders, monetary forfeitures, fines and loss of the license to broadcast. 47 U.S.C. §§ 307(d), 312(a) and (b), 502, 503(b) (Appendix A, pp. 2a, 4a). Their formal issuance was the last relevant step in a gradual process of administrative intrusion into an area which Congress declined to enter. Consequently, we describe the regulatory background before turning to the present record.

A. Regulatory Background

Effective federal regulation of broadcasting began with the Radio Act of 1927, 44 Stat. 1162. In the deliberations leading to its enactment the Senate struck out of a committee bill language providing that, if a licensee should permit a station to be used "for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station . . . ."

67 Cong. Rec. 12503 (1926). In 1933 Congress passed but the President vetoed a bill which would have guaranteed "equal opportunities" to the opposing view whenever a broadcasting station was used "in the presentation of views on a public question to be voted upon at any election, or by a government agency." See H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). The same provision was included in the Senate version of the Communications Act of 1934 (S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934)), but the House rejected the requirement and it was omitted from the enactment. Thus, the only statutory requirement of any right to reply is limited to candidates for public office. Communications Act of 1934, Section 315, 48 Stat. 1088, as amended, 47 U.S.C. § 315 (Appendix A, p. 3a, below).

The Radio Commission appears to have had no general policy of scrutinizing programs for "fairness" although it did speak of the need for competition of opposing views in licensing proceedings involving rival applications or interfering signals where one applicant wished to promote a single selfish interest or point of view. The Radio Commission refused an application to displace a general service station on a preferred frequency where the rival applicant was operating primarily in the interest of a religious denomination.[1] Similarly, the Federal Communications Commission observed in *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178, 181 (1938)—

> Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public. * * * The Commission has accordingly considered that the interests of the listening public are paramount to the interests of the individual applicant in determining whether public interest would best be served by granting an application.

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[1] Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *modified on other grounds*, 37 F. 2d 993 (D.C. Cir. 1930), *certiorari dismissed*, 281 U.S. 706, involving three applications to use the same frequency.

But this case also involved interference, and the policy went no further than to deny a license to an applicant whose intention was to use the facilities as a mouthpiece for propagandizing a particular point of view.[2]

The next phase was extraordinarily restrictive. In *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1941), the Commission barred licensees from broadcasting editorials upon public issues. While renewing Mayflower's license

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[2] *E.g.*, Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850 (D.C. Cir. 1932), *certiorari denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Commission, 47 F. 2d 670 (D.C. Cir. 1931); Chicago Federation of Labor v. Federal Radio Commission, 3 F.R.C. Ann. Rep. 36, *aff'd*, 41 F. 2d 422 (D.C. Cir. 1930).

Two of the other four cases cited by the Government (Br. 13) also involved a choice between rival applications: WBNX Broadcasting Co., 12 F.C.C. 805 (1948); *Laurence W. Harry*, 13 F.C.C. 23 (1948). Robert Harold Scott, 3 P & F Radio Reg. 259 (1946), dismissed a petition seeking to have a broadcaster's license revoked for refusal to sell time for atheistic programs. United Broadcasting Co., 10 F.C.C. 515 (1945), expressed disapproval of a hard and fast rule against selling any time for discussion of controversial public issues; the opinion merely approved a stipulation of all parties to the effect that the licensee would abandon that practice.

The Sixth Annual Report of the Federal Communications Commission, as quoted by the Government (Petitioners' Br. 13), states:

> In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussion of public questions.

The next sentence, not quoted by the Government, reads, 6 F.C.C. Ann. Rep. 55 (1940):

> The duty of serving the public interest does not, however, imply any requirement that the use of broadcast facilities shall be afforded to the particular individual or group, in view of the principles enumerated above [*i.e.* the prohibition upon censorship and the declaration that broadcasters shall not be common carriers].

because Mayflower promised to cease editorializing, the Commission announced (*id.* at 340)—

> A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

The ban lasted eight years.

In 1949, in a *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949), the Commission decided to permit the broadcast of editorials on controversial questions, but it also undertook to impose upon licensees a duty to afford "a reasonable opportunity for the presentation of all responsible positions" and to play a "conscious and positive role in bringing about balanced presentation of the opposing viewpoints." *Id.* at 1250-51. On occasions, the Commission said, the obligation might require a reasonable effort to secure a responsible expression of the opposing views, but otherwise it would be enough to make the facilities of the station available to the groups wishing to state views in opposition to the original expression. *Ibid.*[3]

The *Report on Editorializing* contained a bare hint of a "personal attack" rule. After observing that the fairness

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[3] Under present Commission policy, once a station has broadcast a program during which a controversial viewpoint is expressed, the fairness doctrine places an affirmative obligation upon the broadcaster to present divergent viewpoints, rather than merely requiring him to accede to requests for reply time. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* (hereinafter "Fairness Primer"), 29 Fed. Reg. 10415, 10418 (1964). An account of the history of the fairness doctrine is contained in Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma,* 32 Geo. Wash. L. Rev. 719, 727-47 (1964).

doctrine left the licensee wide judgment in determining "such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there might not be other . . . more appropriate spokesmen," the Commission suggested that the personal involvement of the person making the request should be considered (*id.* at 1251-52)—

> for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.

Three points concerning the original fairness doctrine should be noted:

First, the doctrine, as announced, applied only in licensing proceedings, in review of the licensee's general conduct of his license. Later, when the Commission began to make specific rulings, they carried no sanctions and were believed not to be subject to judicial review except in connection with a denial of license renewal—a belief which continued until the *en banc* ruling of the Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* now pending in this Court on the merits as No. 2, this Term.[4]

Second, the Commission was most explicit in stating that it was not attempting either to regulate the content of any particular broadcast or to attach specific liabilities to any particular expression (13 F.C.C. at 1255):

> The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to such programs

[4] Red Lion Broadcasting Co. v. Federal Communications Commission, 381 F. 2d 908 (D.C. Cir. 1967), *certiorari granted,* 389 U.S. 968.

fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.

Third, the Commission left scope for the licensee to exercise a wide discretion. Under the fairness doctrine the inquiry was limited to whether the licensee was "aware of his listening public and is willing and able to make an honest and reasonable effort to live up to his obligation" (*ibid*).

This was the situation in 1959, when Congress amended the Communications Act by exempting news programs from the operation of Section 315(a), which requires a licensee to give all rival candidates for public office equal opportunities for use of its broadcasting facilities (Appendix A, p. 3a, below). The amendment contained a proviso reciting that nothing in the new exemption for news programs should relieve broadcasters "from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557, 47 U.S.C. § 315(a).

In 1962 the Commission broke sharply away from the settled policy of allowing licensees discretion and judging only the bona fides of their efforts to broadcast a balanced range of opinion upon controversial issues. Three cases decided that year held that the Commission would thenceforth require a licensee to make its broadcasting facilities available without charge to any person whose character was criticized in any discussion of a controversial public question, without regard to the overall fairness of the broadcaster's presentations.[5] The duty was stated categorically

[5] Milton Broadcasting Co. (Clayton W. Mapoles), 23 P & F Radio Reg. 586 (1962); Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962); Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962).

in a Public Notice issued July 26, 1963, 25 P & F Radio Reg. 1899.[6]

The background of the restriction upon political editorials is similar. In the July 26, 1963 notice the Commission broke away from the fairness doctrine and announced that when a broadcaster's facilities were used to take a partisan position upon the issues in an election, or to support or oppose a particular candidate, the licensee must notify the candidate concerned and offer his spokesman an opportunity to answer.

The events involved in the *Red Lion* case arose at this stage in the development of the personal attack rule. Red Lion broadcast over its facilities a program in which the Reverend Billy James Hargis, referring to a campaign document by Fred J. Cook entitled *Goldwater—Extremist on the Right,* repeated previously-published reports that Cook was fired from the New York World Telegram after he made a false charge on television against an unnamed official of the New York City government. Treating this as a personal attack the Commission sent letters to Red Lion directing Red Lion to afford Cook free time in which to reply to Hargis over its facilities. The directive con-

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[6] The notice stated:

> (a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.
>
> (b) When a licensee permits the use of his facilities by a commentator or any person other than a candidate to take a partisan position on the issues involved in a contest for political office or to attack one candidate or support another by direct or indirect identification, he must immediately send a transcript of the pertinent continuity in each such program to each candidate concerned and offer a comparable opportunity for an appropriate spokesman to answer the broadcast.

tained in those letters is before the Court in the *Red Lion* case. Red Lion was simply directed to offer Cook the free use of its facilities. There was no inquiry into the overall fairness or balance of Red Lion's programs, either generally or with specific reference to the 1964 presidential election.

B. Proceedings Below

On April 6, 1966, the Commission moved to formalize the personal attack and political editorial doctrines and to stiffen enforcement by issuing a notice of proposed rulemaking inviting comments on proposed regulations (R. 3a-9a). Respondents and other interested persons filed comments. A very few organizations supported the proposed regulations. The great majority voiced opposition upon the ground that the personal attack and political editorial rules deterred, rather than encouraged, broadcast discussion of public issues (R. 34a, 36a, 60a, 61a, 63a, 72a, 87a). In particular, some comments asserted that the personal attack and political editorial rules had already inhibited stations from carrying controversial programs, especially live discussions of public issues, and had deterred them from editorializing upon political campaigns (R. 92a-100a, 157a-67a).

On July 5, 1967, the Commission adopted the regulations substantially in the form proposed. Their original text appears at R. 221a-22a.

The Memorandum Opinion and Order adopting the regulations dealt with their effect upon freedom of discussion only to the extent of saying that they were "designed to encourage controversial programming" and would not discourage anyone "except for a licensee who wished to present only one side of such programming" (R. 216a). The Commission made no finding upon whether unregulated discussion of public issues and personalities would provide the public with a full and fair spectrum of opinion upon controversial issues.

On July 27, 1967, Radio Television News Directors Association *et al.* filed in the Court of Appeals for the Seventh Circuit petitions to review and set aside the regulations (R. 264a). Similar petitions (R. 270a and 284a), filed in the Second Circuit by respondents National Broadcasting Company and Columbia Broadcasting System, were transferred to the Seventh Circuit under 28 U.S.C. § 2112.

Thereafter, but within a month of its initial order, the Commission issued the first of two amendments acknowledging that the personal attack regulation, as promulgated, might restrict the presentation of public issues. The amendment exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." The rationale for the change was explained by the Commission (R. 223a-24a):

> To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks.

In other words, the original regulation admittedly interfered with freedom of the press.

The second amendment was adopted on March 27, 1968. By that time this Court had granted certiorari in the *Red Lion* case, 389 U.S. 968, and postponed oral argument until the Seventh Circuit should have decided the present case, 390 U.S. 916. The briefs filed in the Seventh Circuit showed how the personal attack rule would inhibit the presentation of such distinguished public affairs programs as Eric Sevareid's news commentaries, *Face the Nation*, and *Meet the Press*. The illustrations will be found at R. II 1-130. The amendment apparently resulted from a letter written by Assistant Attorney General Turner five days before the Government's brief was due in the court of appeals, suggesting that "the Commission might wish to weigh the

possibility of considering revisions of the rule before proceeding further with the cases now before the Seventh Circuit" (R. 310a-11a). The proposal provoked considerable controversy among the Commissioners, including Commissioner Loevinger's suggestion, denied by his colleagues, that "[f]or the Commission to rewrite its rules now is obviously a cosmetic effort to present a better face in court" (R. 306a).[7]

The new amendment made the personal attack regulation inapplicable—

> (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

The exemption is much narrower than it seems, for its scope is carefully tailored to the illustrations used in the Seventh Circuit briefs. Thus, Eric Sevareid's regular broadcasts would be exempt because they are "contained in" the CBS evening news program. Identical commentaries, including Sevareid's special programs, when not bracketed within a newscast, remain subject to the regulation. Similarly, the term "bona fide news interview" covers only programs in a regularly scheduled series. *Face the Nation* and *Meet the Press* are excepted because they are regularly scheduled, but the identical interviews would still subject a broadcaster to the liabilities imposed by the regulation if they were part of a specially scheduled panel discussion, debate, news conference or documentary. In addition, the Commission warned that even the excepted programs remain subject to the "fairness doctrine" (R. 232a-33a).

The last qualification seems to render the new exemptions almost entirely illusory. In paragraph 5 of the supplemen-

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[7] The sundry pleadings in the court of appeals and the opinions in the Commission appear at R. 291a-344a.

tal opinion issuing the amendment (R. 228a-29a), the Commission advised the industry not only that the fairness doctrine would continue to apply but also that, in this instance, the fairness doctrine identifies "a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." The net effect seems to be this: Suppose that a personal attack occurred on a regularly scheduled live and unrehearsed news interview program—such as Congressman Powell's describing Congressman Conyers as "a black Judas" (R. II 66). Under the original personal attack regulation every CBS station would have been required to give Congressman Conyers (1) notice, (2) a tape or transcript, and (3) free time for reply. Under the latest amendment, the regulation is inapplicable but licensees must either broadcast the viewpoint of the person attacked or offer him free time for reply under the fairness doctrine as interpreted in paragraph 5.

In issuing the amendment, the Commission sought to steer between acknowledging the reason for the revision and denying the inhibitory effect of the regulation upon discussion of public issues. The opinion (R. 229a, 230a, 233a) explained that in view of the "importance of broadcast journalism in informing the public with respect to political events and public issues" and the absence of past abuse in these expected areas—

> we have decided to strike the balance in favor of exempting these news program categories other than the news documentary. Such action avoids *any* possibility of inhibition in these important areas of broadcast journalism • • •
>
> In sum, since our goal is to encourage robust wide-open debate, we have reexamined the question presented here • • •

But a footnote added (R. 234a n. 5):

> We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

The Commission did not explain why it would be an "abuse" for Congressman Powell to call Congressman Conyers a "black Judas" and Congressman Pepper a "number one racist" (R. II 67) in a specially scheduled interview but not on *Face the Nation;* or why the regulation would inhibit commentaries during newscasts but not on other occasions such as a round-up of political reporters.

Commissioner Loevinger dissented upon four specific grounds (R. 240a-41a):

> First, the amendments now adopted, like the preceding rules, have been inadequately considered and are badly drafted. Second, the amendments are unreasonable and unconstitutionally vague. Third, the amendments will impose more regulation and a greater burden on the free expression of ideas and news than the rules without the amendments. Fourth, I have come to doubt the competence of a Government agency such as the Commission to promulgate and administer rules such as these in the area of speech.

Commissioner Bartley also dissented from the adoption of formal regulations.

The court of appeals held the original and amended regulations invalid because they "collide with the free speech and free press guarantees contained in the first amendment" (R. 371a). The court stated (R. 368a-69a):

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

SUMMARY OF ARGUMENT

I

The personal attack and political editorial regulations unconstitutionally abridge the freedom of speech and press guaranteed by the First Amendment.

New York Times Co. v. Sullivan, 376 U.S. 254, governs this case. The "personal attacks" of which the Commission seeks to lay hold are the very kind of criticisms the *New York Times* case held constitutionally privileged. Broadcasters are a branch of the press, not mere conduits of others' expressions. Their journalistic functions give the public the same interest in the freedom of broadcasters that it has in the freedom of newspapers. Only two distinctions between this case and *New York Times* are conceivable. Neither is constitutionally relevant.

One conceivable distinction is that where Alabama inhibited personal criticism of public officials by the imposition of an obligation to pay damages, the Commission inhibits debate by imposing a right of reply at the broadcaster's expense. This is a distinction without a difference. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government" (*Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (concurring opinion)). Attaching a right of free reply to any criticism of the personal characteristics of public figures, even when the stated facts are relevant and true, inhibits debate because it makes interference with the broadcaster's journalistic judgment, administrative burdens (including disruption of programming), and loss of revenue, the price of speaking out upon a public issue. The fear of imposing these burdens upon one's own station or every station that carries a network program is bound to generate the same kind of self-censorship that the Court sought to avoid in *New York Times*, not only on the part of reporters, commentators, editors, and producers but also by those who arrange programs and their invited guests.

The second conceivable distinction is that this case involves broadcasting, the "fairness" of which the Government seeks to regulate in the hope of providing the public with access to a "balanced presentation" of views upon controversial issues. But broadcasting is part of the press; it performs the same journalistic and editorial functions as magazines and newspapers and its relative journalistic importance is bound to increase. The basic postulate of the First Amendment is that the public will best be informed upon matters essential to self-government if debate is open and uninhibited, even though it includes ill-timed, biased or unfair individual expressions. Over-all fairness is left to the multiplicity and diversity of voices attendant upon unregulated expression—not to government supervision of the "fairness" of individual publishers. The claim that an exception must be made for the personal attack and political editorial regulations fails for two independently sufficient reasons:

(1) There is not the slightest reason to believe that Government regulation of the "fairness" of each radio and television station is necessary to give the public access to multiplicity and diversity of opinion. We deal here not with unique situations that might be imagined but with a general regulation applicable everywhere, to radio as well as television and to individual stations as well as networks. Under such circumstances one cannot judge access to full and fair debate by supposing that each member of the public sits glued to the programs of a single broadcaster. In nearly every community the number of broadcasting stations whose programs are received is greater than the number of newspapers of general circulation. Radio and television are only two of many forums in which the general public has access to a multiplicity and diversity of unregulated expression. The actual condition of the media, therefore, contradicts the claim that the fairness of each individual broadcaster's programming must be subjected to official scrutiny in order to secure the public interest in exposure to all sides of public questions.

(2) The challenged regulations are more restrictive than necessary to secure "fairness" on the part of individual stations. Unlike the fairness doctrine, instead of viewing the licensee's performance as a whole the regulations fasten upon specific programs, even single phrases in a program. They leave no scope for judgment by the licensee but hold him rigidly to the Commission's *ex post facto* determinations. They apply even though the programming is "fair" and "balanced" under other tests. Each "personal attack" or political editorial entails potentially burdensome obligations. Each violation carries the threat of penal forfeiture, criminal prosecution or license revocation. The regulations are also exceedingly vague. Such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications, as the Commission itself has acknowledged (R. 215a). Faced with uncertainty and the threat of burdensome obligations if he guesses wrong at the time of the broadcast, the licensee—as the court below recognized—"will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will 'steer far wider of the unlawful zone.' *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)" (R. 362a). The challenged regulations are therefore unconstitutional even if the less restrictive general fairness doctrine can be sustained.

II

The Communications Act does not authorize the challenged regulations.

The Commission's rule-making authority is to make such regulations "as may be necessary in the execution of its functions" or "to carry out the provisions of this Act." Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r) (Appendix A, p. 1a, below). Regulating the content of public affairs programs is neither a Commission function nor a purpose of the Act. Section 326 (Appendix A, p. 4a, below) provides that nothing in the Act shall be understood "to give the

Commission the power of censorship over the radio communications or signals transmitted by any radio station." In considering the Radio Act of 1927 and later the Communications Act of 1934 Congress rejected proposals to require a licensee who presented one side of a public issue to give equal opportunity for reply.

The Government's argument that the 1959 amendment to section 315 supports the challenged regulations rests upon a proviso declaring that the exemption of news programs from the equal-time-for-political-candidates rule should not be construed as relieving broadcasters "from the obligation imposed upon them under this Act . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Appendix A, p. 3a, below). Even if this reference to the fairness doctrine could be said to constitute backhanded approval, the proviso does not give even oblique support to the challenged regulations. The personal attack and political editorial rules did not exist in 1959. They go beyond any interpretation of the fairness doctrine prior to 1959 both because they impose detailed obligations based upon specific incidents without regard to the licensee's over-all performance and because they leave no room for the honest exercise of discretion. These limitations were emphasized in the Commission's testimony upon the 1959 amendment.

When personal and political liberties are at stake, only "the most explicit authorization" will support agency action in "an area of doubtful constitutionality." The principle is supported both by the propriety of avoiding doubtful constitutional questions and by the wisdom of requiring decisions of great constitutional import to be squarely faced by Congress rather than "relegated by default to administrators who, under our system of government, are not endowed with authority to decide them" (*Greene* v. *McElroy*, 360 U.S. 474, 506-08).

III

The challenged regulations are also void because the Commission itself, like the Congress, has never squarely confronted and made a finding upon the critical question. The only even arguable constitutional justification for regulations inhibiting political editorials and personal criticisms privileged under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, would be a showing that the technology of broadcasting denies the public access to full diversity and multiplicity of opinion unless each individual licensee presents balanced programs. There are strong reasons for concluding that no such condition exists. Whether that be true or not, the Commission's case is defective because it has made no finding upon the question.

This is no mere technical requirement. Liberty of the press should not be left at the mercy of casual assumptions or inattention to the facts. The Court cannot judge whether an impelling legislative purpose justifies the inhibition upon freedom when the facts concerning the need have been neither developed nor evaluated by the bodies with primary responsibility.

ARGUMENT

I

THE PERSONAL ATTACK AND POLITICAL EDITORIAL RULES ABRIDGE THE FREEDOM OF SPEECH AND PRESS GUARANTEED BY THE FIRST AMENDMENT

This case and *Red Lion Broadcasting Co.* v. *Federal Communications Commission* require the Court, for the first time, to examine in depth the application of the First Amendment to the Commission's claim of power to regulate the content of radio and television broadcasts discussing public issues. Prior decisions make it plain, on the one hand, that the guarantees of the First Amendment are generally applicable to broadcast journalism because the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell*

v. *City of Griffin*, 303 U.S. 444, 452. See *Burstyn* v. *Wilson*, 343 U.S. 495, 503; *United States* v. *Paramount Pictures*, 334 U.S. 131, 166; *St. Amant* v. *Thompson*, 390 U.S. 727; *Superior Films* v. *Department of Education*, 346 U.S. 587. On the other hand, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, correctly held that, because of the special nature of the medium, the government may not only license broadcasters under rules preventing interference and securing qualified licensees but it may also regulate the economic structure of the industry—the ownership and control of licensees—in ways that promote independence.[8] The Court has never had the occasion, however, to consider regulatory measures dealing directly with the content of broadcasts upon public issues. Rulings by the lower courts prior to the instant case have been confined to occasional opinions of the Court of Appeals for the District of Columbia Circuit.[9]

For a number of years the Federal Communications Commission, as we show in our Statement, has been gradually intruding upon the freedom of the electronic press: first, by prohibiting all broadcast editorials (a prohibition since withdrawn); second, through the fairness doctrine and its latter-day interpretation as applied to "personal attacks"; and, third, through the personal attack and political editorial regulations here under review. There was no real challenge to these Commission policies prior to this litigation, partly because there appeared to be no method of attacking

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[8] See also Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134; Federal Communications Commission v. WOKO, Inc., 329 U.S. 223; Regents of the University v. Georgia, 338 U.S. 586.

[9] Red Lion Broadcasting Co. v. Federal Communications Commission, *supra;* Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); and cases cited in note 2, above.

the fairness doctrine without risking loss of a broadcasting license and partly because the fairness doctrine was much less inhibiting than the challenged regulations. As Chief Judge Bazelon recently observed, "it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." *Banzhaf* v. *Federal Communications Commission*, D.C. Cir., No. 21,285, decided Nov. 21, 1968, slip. op., pp. 31-32, petition for certiorari pending sub nom., *Tobacco Institute* v. *Federal Communications Commission*, No. 1036, Oct. Term, 1968.

But while the present case requires examination of fundamental questions, the decision can be put upon relatively narrow grounds. The court of appeals, in invalidating the regulations under the First Amendment, confined itself to ruling upon the constitutionality of these regulations upon this record. The opinion does not rule upon the constitutionality of the fairness doctrine to which the Government devotes most of its brief.

Our argument follows the course taken by the court below. The basic proposition is very simple: *New York Times Co.* v. *Sullivan*, 376 U.S. 254, governs this case. The "personal attacks" of which the Commission seeks to lay hold are the same kind of criticism of public figures that *New York Times* held to be constitutionally privileged. The public has the same interest in the journalistic freedom of broadcasters as of newspapers. Both are part of the press. *New York Times* cannot be distinguished upon the ground that where Alabama inhibited personal criticism of public officials by the imposition of an obligation to pay damages, the Commission would inhibit it by attaching a right of reply at the broadcaster's expense. The latter obligation, which the Commission would attach even to true statements, is potentially as burdensome and even more likely to generate self-censorship than fear of a judgment for damages. Nor can *New York Times* be distinguished upon the ground

that this case involves the electronic press, the "fairness" of which Government thinks it must regulate in order to insure that the public has access to a variety of views upon controversial issues. The public generally has access to multiplicity and diversity of opinion through a wide variety of uninhibited voices. Furthermore, the challenged regulations impose burdensome restraints and generate self-censorship wholly unnecessary to secure "fairness" on the part of individual broadcasters.

In developing this thesis, we invoke a number of basic constitutional principles which suggest that, under existing conditions, any Commission regulation of broadcast debate upon public issues violates the freedom of the electronic press. But we need not stand upon so broad an argument. The personal attack and political editorial regulations have additional constitutional weaknesses which would render them invalid even if the constitutionality of the fairness doctrine were upheld. The heart of our case, therefore, is that the concurrence of all the factors renders the challenged regulations invalid regardless of what might be true of different rules or of these rules under different conditions.

A. Broadcast Licensees Exercise Journalistic Functions Which Make Them Part of the Press Whose Freedom Is Secured by the First Amendment.

Ordinary experience demontrates that, although some aspects of radio and television broadcasting fall within the entertainment industry, others are functionally indistinguishable from conventional journalism. Broadcast licensees gather, edit, and present the news. In the case of national news, the network services perform much the same function that the wire services fill for newspaper publishers. Local news is gathered, edited, and presented by the corps of reporters and editors organized by individual broadcasting stations. There is live coverage of portions of major events, along with commentary, as at the 1968 Democratic

and Republican National Conventions. Many radio and television stations carry editorials despite the discouragement of the challenged regulations. Eric Sevareid and Edward P. Morgan broadcast counterparts in the electronic press of the newspaper columns of James Reston and Joseph Kraft. In-depth coverage is provided by documentaries and other special features. In addition, broadcasters serve journalistic functions much like those of the editors of magazines and like journals of opinion; they select guests to appear on their programs to present both information and opinion.

The Government's claim to censorial power ignores these facts. The Solicitor General's words and arguments throughout his brief beg the question by assuming that a broadcast licensee is simply a carrier or vehicle of communication (Petitioners' Br. 41-42, 56-57). Similarly, the amici supporting the Government take as their premise the erroneous assumption that broadcasting is to be likened to a public park as a place for meetings, or to a street as a place for parades.[10] Forty or fifty years ago it was unclear whether radio stations would develop into an active branch of journalism or be simply passive channels of communication selling the use of broadcasting facilities to others. Early discussions of government regulation of broadcast licensees sometimes assumed the latter characterization.[11] In fact, the development has been in the other direction. One cannot, without advancing a misleading anachronism, ignore the fact that radio and television broadcasters engage in activities and serve functions in our society which

[10] Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, pp. 7-14. Even if this were so, it would be the Government, not the broadcaster, who would be prohibited from discriminating among applicants on the basis of the views which they did or did not state. See Kalven, *The Concept of a Public Forum*, 1965 Sup. Ct. Rev. 1, 25 (Kurland ed.).

[11] *E.g.*, United Broadcasting Co., 10 F.C.C. 515 (1945).

are indistinguishable from the activities and functions of other journalistic media. In the future, an increasing part of the functions of the press is likely to be performed via electronic media instead of newspapers.[12]

The Government's presupposition is also wrong as a matter of legal theory. While the Radio Act of 1927 was under consideration, the wisdom of treating radio broadcasting as a common carrier was considered and rejected. See. S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926); 67 Cong. Rec. 12358, 12501-04 (1926); 68 Cong. Rec. 4152 (1927). The present Act expressly enacts that "a person engaged in radio broadcasting shall not be deemed a common carrier." Communications Act of 1934, Section 3, 48 Stat. 1064, 1066, 47 U.S.C. § 153(h) (Appendix A, p. 1a, below).

In *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 474, the Court observed that "the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such."[13]

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[12] Within the next decade, it is likely that individual Americans will be receiving press communications not only by means of off-the-air radio and television broadcasts but also via cable television connected to their homes, direct satellite-to-home transmission, and facsimile newspapers transmitted electronically to their homes. See "A Searching Look at the Hardware That Can Reshape TV Broadcasting," Television Magazine, Sept. 1967, p. 35; Sexton, *Bigness —Bad for Newspapers or Merely Inevitable?*, The Quill magazine, Oct. 1967, p. 22; Hult, "Satellites and Future Communications, Including Broadcast," paper presented before the American Astronautical Society, Dallas, Texas, May 1-3, 1967 (reproduced by the RAND corporation).

[13] Section 315, which requires equal treatment for political candidates, is a limited exception to the general theory of the Communications Act since it requires a broadcaster who chooses to make time available to a political candidate, to "carry" whatever the candidate wishes to say and to extend the same opportunity to all other candidates for the office upon equal terms.

Section 315 raises different constitutional issues than the present case for four reasons:

We recognize the need to face the question whether radio and television are not subject to greater government control over their broadcasts than the print media because of the consequences of the technology. But the examination of that question ought to begin with candid recognition of the fact that the functions performed for society by the radio and television broadcaster in the field of public affairs are the same journalistic functions performed by newspaper publishers. Broadcasting is a branch of the press. Its activities and functions make it—no less than newspapers—"one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills* v. *Alabama,* 384 U.S. 214, 219.

First, when a licensee carries a candidate's speech, it exercises virtually none of the news gathering functions or editorial functions licensees exercise in the public affairs broadcasts covered by the challenged regulations. The broadcaster's freedom to present his views without incurring burdensome obligations is in nowise affected.

Second, the area covered by Section 315 is very narrow; it applies only to qualified candidates for public office. This was a deliberate legislative decision. See pp. 3-4, 8, above, and pp. 64-76, below.

Third, the personal attack and political editorial regulations impose financial cost upon the broadcaster's taking an editorial position upon candidates or criticizing the personal characteristics of a public figure because he must carry the reply free. Section 315 requires only equal treatment.

Fourth, the vagueness and ambiguities inherent in the personal attack rule, which induce self-censorship, are not involved in Section 315. See pp. 59-64, below.

There is good reason to believe that even Section 315 deprives the public of much useful political debate.

B. The Challenged Regulations Seek To Govern the Public Discussion of Issues at the Center of the Constitutionally Protected Area of Free Expression.

The challenged regulations not only attempt government supervision of what is said by a branch of the press; they invade the central citadel protected by the First Amendment. The personal attack regulation embodies the proposition that a broadcast licensee may not express any criticism of a public figure reflecting upon his character unless he is given notice of the broadcast, the text of the criticism, and free use of the broadcasting facilities for reply. These demonstrable burdens dampen the vigor and limit the variety of debate (see pp. 29-35, below). Criticism of the conduct of public persons, including criticism which reflects upon their personal character, is uniquely valuable—and uniquely protected—speech, because it is indispensable to informed self-government. Editorials supporting or opposing candidates for office, to which the political editorial regulation attaches a similar, burdensome liability, are also integral parts of the democratic process.

New York Times Co. v. *Sullivan*, 376 U.S. 254, held that a State cannot constitutionally award damages for defamatory statements about the conduct of a public official unless the statements were made with knowledge of their falsity or reckless disregard for truth. The same constitutional privilege extends to statements about persons "involved in issues in which the public has a justifiable and important interest." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147-148, 155, 162. "[A] rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials." *Id.* at 148-49, *quoting Pauling* v. *Globe Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966). These principles, developed in cases involving newspapers and magazines, are equally applicable to radio and television. *St. Amant* v. *Thompson*, 390 U.S. 727.

Virtually all the broadcasts to which the regulations apply fall in the privileged area. The point is indisputable in the case of election editorials. The acknowledged primary function of the personal attack regulation is to apply an automatic formula to every broadcast discussion of men involved in politics and government. Among the leading decisions which the personal attack rule codifies are cases involving criticism of local officials in Milton, Florida;[14] of the general manager of a local rural electrification cooperative;[15] and of a Governor of California running for re-election.[16] The scope of the current regulation is confined by definition to criticisms voiced "during the presentation of views on a controversial issue of public importance" (Appendix B, p. 6a, below). There could be no plainer acknowledgement of the intent to regulate broadcast criticism of public officials and other public figures.

The personal attack rule is not confined to statements that are made with knowledge of falsity or reckless indifference to truth. Not even truth itself is a defense. Nor is the regulation confined to irrelevant character assassination. It applies both to incidents bearing upon fitness for office and to the actual conduct of public affairs.

The conclusion undisputably emerges that the challenged regulations would regulate the electronic press in broadcasting ideas "at the very center of the constitutionally protected area of free expression." *New York Times Co.* v. *Sullivan*, 376 U.S. at 292.[17]

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[14] Milton Broadcasting Co. (Clayton W. Mapoles), 23 P & F Radio Reg. 586 (1962).

[15] Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962).

[16] Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962).

[17] See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 (Kurland ed.).

C. The Liabilities Imposed by the Regulations "Abridge" Freedom of Expression.

The common law of defamation attached liability for compensatory damages to defamatory criticism of public figures. The line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254, held that attaching that condition to political expression violates the First Amendment.[8] The Commission now seeks to attach even to non-defamatory criticism liability to provide a "right of reply" over the licensee's facilities and at its expense. Since the new form of liability is both broader and more onerous, its imposition is equally unconstitutional. The great liberties secured by the First Amendment are protected against other forms of abridgment than criminal and civil liability. *Lamont* v. *Postmaster General*, 381 U.S. 301; *Talley* v. *California*, 362 U.S. 60; *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 402; *Thomas* v. *Collins*, 323 U.S. 516; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Grosjean* v. *American Press Co.*, 297 U.S. 233.

In issuing the regulations the Commission argued "that they do not *proscribe* in any way the presentation by a licensee of personal attacks or editorials on political candidates" (R. 212a, emphasis supplied). The Government's brief repeats the argument in various forms (Petitioners' Br. 41, 58). If proscribes means "absolutely prohibit," the assertion may be literally accurate, but it confuses the issue because it misconceives the extent of the constitutional protection. One who is subjected to governmentally imposed burdens if he speaks his mind upon a public issue does not enjoy the freedom of speech guaranteed by the Constitution. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to gov-

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[8] St. Amant v. Thompson, 390 U.S. 727; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (per curiam); Curtis Publishing Co. v. Butts, 388 U.S. 130; Time, Inc. v. Hill, 385 U.S. 374; Rosenblatt v. Baer. 383 U.S. 75; Henry v. Collins, 380 U.S. 356; Garrison v. Louisiana, 379 U.S. 64.

ernment" (*Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (concurring opinion)). The Court has often struck down laws attaching conditions to the exercise of First Amendment rights. The *Lamont* decision invalidated a statute that conditioned freedom to receive foreign communist propaganda upon the addressee's notifying the Postmaster General of his wish to receive it. A registration requirement imposed upon a labor organizer as a condition of making a speech was held unconstitutional in *Thomas* v. *Collins*, 323 U.S. 516. *Talley* v. *California*, 362 U.S. 60, invalidated an ordinance requiring the sponsor of a pamphlet to identify himself upon it. See also *Speiser* v. *Randall*, 357 U.S. 513; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402; *Murdock* v. *Pennsylvania*, 319 U.S. 105.[19]

The personal attack and political editorial regulations impose burdens upon the journalistic judgment of broadcasters which are unconstitutional under the cited cases, first, because the obligations incurred as the price of privileged speech are onerous and, second, because they are bound to generate self-censorship.

1. Under the personal attack rule a broadcaster must scrutinize every public affairs program to see whether it includes anything that might be a "personal attack": panel discussions, news analyses outside the time limits of a newscast, documentaries, commentators (except during newscasts), and paid or unpaid political broadcasts. If a "per-

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[19] Earlier, in Near v. Minnesota, 283 U.S. 697, 720, the Court held that the right of a member of the press to present his views on public issues cannot be made dependent on his publishing some other matter, stating:

> [I]t does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions [defamation]. If the publisher has a right, without previous restraint, to publish them his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

sonal attack" is included, the broadcaster must notify every person upon whose "character" reflection has been cast; it must give him an exact tape or transcription of the text of the criticism, identifying the date and program on which the "attack" occurred and it must offer a reasonable opportunity to respond over the licensee's facilities at the licensee's expense.

The obligations resulting from even a short public affairs program could multiply rapidly. A few minutes of commentary by Eric Sevareid at the time of Jack Ruby's death contained remarks that could well have been construed as "personal attacks" upon six or seven public figures (R. II 6-7).[20] An unrehearsed panel discussion of a controversial session of the city council or State legislature might well include unpleasant, biting criticism of half a dozen lobbyists or politicians. Even a program on the modern theatre might well produce adverse personal comments upon authors, producers, actors or critics.

Broadcasters anxious to present a variety of opinion upon a wide range of issues through representative commentators, documentaries, and the personal appearance of diverse public figures, nonetheless shrink from a course of action which may require them later to allocate broadcast time in a way contrary to an honest and reasonable journalistic judgment but required by the mechanical rules of the Commission. See *e.g.* R. 157a-175a.

Imposing an obligation to furnish free use of a station's facilities attaches heavy contingent financial loss to every program dealing with public affairs, unless the program is rigorously censored. The broadcaster's stock in trade is time. The maximum time available is 24 hours a day. The

[20] The Sevareid broadcast would have been subject to the personal attack regulation in its original form but exempt under the March 27, 1968 amendment because it was incorporated into a regularly scheduled news program. The same commentary would be subject to the regulation today if broadcast at any other period.

Commission's rule says, in effect, that if a broadcaster sells or uses an hour for discussion of public questions which includes commentary upon public persons, then the Commission will take from the hours remaining as much additional time as anyone subjected to criticism reflecting on his character may reasonably wish for reply. In its effects upon the broadcaster, therefore, the right-to-reply doctrine operates as a "tax" upon controversial speech, much like the taxes invalidated in *Murdock* v. *Pennsylvania,* 319 U.S. 105 and *Grosjean* v. *American Press Co.,* 297 U.S. 233. The more time the broadcaster allocates to debate involving public figures, the higher the "tax" imposed by the Commission.

The burden is not limited to the direct loss of saleable time. Programs are arranged many weeks in advance. Clearing time for reply entails not only heavy administrative burdens but also loss of good will from both sponsors and audience.

2. The personal attack rule generates self-censorship. In the *New York Times* case the Court observed (376 U.S. at 278):

> Whether or not a newspaper can survive a successsion of such judgments [for damages for libel], the pall of fear and timidity imposed upon those who give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive.[21]

Similarly, even though a broadcaster might be able to carry the administrative burdens and financial cost of full compliance, the self-censorship generated by the Commission's rule renders it void under the First Amendment. News commentary, analyses of public issues, and documentaries often take time from programs producing greater revenue. If the broadcaster must calculate each hour taken from other programs at 100 percent plus an indefinite contingent allowance for replies by persons subjected to personal criticism, he will be under heavy pressure to escape financial loss and irate sponsors by avoiding discussion of

controversial matters of public importance. Everytime a producer or sponsor is inconvenienced in order to clear time for the reply, the burden of his complaints will be added to the financial pressures.

Similar pressure is bound to be felt at every step of radio's and television's journalistic endeavors. For example, Eric Sevareid, at the time of Henry R. Luce's death, broadcast a short essay upon Luce's contributions to American journalism (R. II 15-16) in the course of which he commented upon the liveliness of *Time* magazine but observed that "*Time* strained in every senfence to avoid dullness, which often meant straining truth." Since the editors of *Time* are an identifiable group and the charge of "straining truth" could be said to reflect upon their integrity, the broadcast might well be held to create liability to offer *Time*'s editors free time for reply. If the Commission's rule were upheld Sevareid and other commentators would repeatedly be put to a choice between deleting comments upon public figures that might be regarded as "personal attacks" and risking remarks making every station carry-

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[21] Amici Curiae Office of Communication of the United Church of Christ, *et al.* have alleged in their brief (p. 37) that there is no basis for the suggestion that the burden of furnishing time to reply under the fairness doctrine is comparable to a threat of a $500,000 libel judgment for a single attack such as was involved in New York Times Co. v Sullivan. This allegation ignores reality. For example, the average cost to a commercial sponsor for 15 minutes of prime program time on one of the four Chicago VHF television stations (WBBM-TV, WGN-TV, WBKB-TV WMAQ-TV) is approximately $2,000. Television Digest, Inc., *Television Factbook* 207-b, 208-b, 210-b, and 213-b (1968-69 ed.). In the case of a network of 100 or more stations, the value of the time would be a multiple of the pertinent time costs of the individual stations involved.

ing a program liable to clear time for reply (unless they confined their comments to newscasts).[22]

Networks and broadcast licensees could hardly escape the pressure in choosing their own producers, commentators, news analysts, and moderators and participants in panel discussions, and even in choosing certain types of entertainment programs lampooning public figures and

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[22] Even if the comments are confined to newscasts, the Commission's special application of the fairness doctrine would require presentation of the public figure's position. See pp. 12-13, above, and n. 24, below. The pressure towards self-censorship is also illustrated by the documentary, "Ku Klux Klan: The Invisible Empire," broadcast September 21, 1965 (R. II Supp. Exh. 1-28). The program contained strong criticism of the Klan, but its officials were also given a full opportunity to speak for themselves. The fairness of the program in this respect seems beyond question. However, the documentary also contained more specific and sometimes quite incidental attacks upon at least three other individuals: Jebrald Walraven who was said to claim membership in the Klan and to have turned money over to Lincoln Rockwell as head of the American Nazi Party; the City Attorney of Bogalusa, Louisiana, charged with the duty to prosecute Klansmen for violence against civil rights workers, who was said himself to be a Klansman; and Sheriff Rainey of Neshoba County, Mississippi, charged with the murder of three civil rights workers, who was described as "[o]ne law enforcement official sympathetic to the Klan." Under the personal attack regulation the producer would be forced to choose among (1) omitting specific reference to these telling instances; (2) offering the individuals a place in the documentary at the expense of other material that the producer considered more important; and (3) subjecting every station that might carry the program to possible liability to give notice and a transcript to Walraven, the Bogalusa City Attorney, and Sheriff Rainey, and to offer them free time for reply. The pressure upon the producer to "play it safe" by omitting anything that might be considered a personal attack is all too evident.

Even if the Commission were to say that some of these charges are not "attacks" upon personal character, the producer of "Ku Klux Klan: The Invisible Empire" could not know whether the Commission would make such a ruling, and the uncertainty would be enough to create pressures towards self-censorship.

events.[23] It would be safer, more profitable, and less troublesome to prefer the producer of inoffensive rather than controversial documentaries, to broadcast the bland pundit who dealt in abstractions rather than the biting critic of the shabby and self-seeking; and to select the moderator who steered panel discussions away from, rather than towards, the personal fitness of public officials.

Self-censorship must also operate, under the personal attack rule, to curtail the willingness of licensees to permit the use of their facilities by outspoken public figures. A licensee can take pains to present men with varied interests and points of view; it neither can nor should undertake to censor their presentations. Under the personal attack rule, however, the licensee must either prevent personal criticism or else provide the opportunity for reply regardless of its journalistic judgment and at its own expense as the price of having offered the public a chance to hear the first speaker. For example, Adam Clayton Powell, in a recent one hour program, voiced what would seem to be personal attacks upon his estranged wife, whom he called "a liar," Judge Matthew Levy, who he said had issued "an indecent, obscene, illegal, unilateral order," Congressman Conyers whom he called "a black Judas," and Congressman Pepper whom he described as "one of the number one racists of Manny Celler's committee against me." One of the reporters who was questioning Powell stated that "Rap Brown and Stokely Carmichael had been advocating guerilla-type warfare in the cities," which would seem also to have been a personal attack. (R. II Supp. Exh. 55 *et seq.*) If even three of these people had been given notice as required by the regulation and asserted the right to free time in which to reply on a nation-wide hook-up, the resulting cost and inconvenience would inevitably force the broadcasting system

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[23] Radio and television programming in the "talk," "entertainment" and other arbitrary FCC classifications are deserving of First Amendment protection from the inhibiting rules. "The line between the informing and the entertaining is too elusive . . ." because "[w]hat is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510.

to think twice before again inviting such a free-swinging controversial speaker to appear on one of its programs.[24]

In appraising the burdens which the personal attack rule puts upon broadcast discussion of public issues, it is important to remember that it is not confined to defamatory broadcasts. There is no privilege of fair comment upon acknowledged facts. There is no question of recklessness or malice. Not even truth is a defense. The liability runs to groups as well as individuals.[25]

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[24] On other recent programs, William Manchester described Robert Kennedy "as not always scrupulous about the means he employs" (R.II 122); Senator Russell Long described certain employees of Senator Dodd as "treacherous" (R.II 75); and Governor Smylie attacked Robert Welch and John Rousselot of the John Birch Society for "absolute lack of credibility" (R.II 60).

Today, these programs would fall within the exemption for regularly scheduled news interviews (Appendix B., p. 6a, below). The net effect is no different, however, because the exemption would still leave the programs subject to the special version of the fairness doctrine explained in the opinion creating the exemption and that version would require offering the same notice and opportunity for reply, either by the person attacked or someone presenting his point of view. See pp. 12-13, above.

[25] These aspects of the Commission's rule distinguish the "right-of-reply" sometimes proposed as a remedy for defamation. The burden imposed by the Commission's rule is evidenced, however, by the widespread recognition of the harm from applying a right-of-reply-to-defamation doctrine to radio. Professor Zechariah Chafee observed:

> The radio is obviously unsuited to the simple machinery of reply provided by the French and German statutes [obligating the press to print replies to personal attacks]. It might be entirely natural for a commentator to mention two or three prominent persons, e.g., Mr. Ickes, Mr. Pauley, and Mr. Truman, in a single broadcast. If each of those three men should possess the legal right to reply, they would take over practically all the time of this commentator for his next broadcast. The whole character of news comments might easily be changed by such a legal requirement. Consequently, French and German courts have held their statutes inapplicable to the radio. Chafee, *Government and Mass Communications* 187-88 (1947).

Since Professor Chafee wrote, Germany has recognized a limited right of reply in broadcasting. See, generally, Scheer, *Deutches Presserecht* (1966).

Nor is it material that the Commission wished to encourage debate, rather than discourage it. The question is not one of purpose but of consequence. Inhibitions upon speech and press are not saved by a beneficent intention.

There is no greater merit in the Government's argument (Br. 76-78) that the regulations should be sustained until the Commission has time to observe how they operate in practice. The First Amendment does not permit experimentation with inhibitions upon freedom of discussion. No rule is better settled in current constitutional doctrine than that the validity of a restraint upon speech or press will be judged on its face—that is, by its natural and probable tendency—without waiting for specific evidence of suppression. *E.g., Dombrowski* v. *Pfister,* 380 U.S. 479, 486-87; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 516-17; *NAACP* v. *Button,* 371 U.S. 415, 432-33; *Thornhill* v. *Alabama,* 310 U.S. 88. The principle has its greatest value in areas where a statute generates self-censorship, for otherwise all society—not merely those seeking to exercise their rights—would be the loser. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66; *Talley* v. *California,* 362 U.S. 60; *Smith* v. *California,* 361 U.S. 147; *Cf. Speiser* v. *Randall,* 357 U.S. 513, 526.

D. The Regulations Are Not Justified by the Commission's Belief That They Will Improve the "Fairness" of Broadcast Discussion.

The justification offered by the Commission in defense of the personal attack and political editorial regulations is that they will produce programs that give the public a better informed view of all sides of controversial public issues.[26] The justification fails, we submit, for two independent reasons:

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[26] Although the Commission's customary argument that licensing and allocation of frequencies require the challenged regulations (R. 366a) has not been advanced by the Solicitor General, the fal-

(1) Government regulation of public affairs broadcasts, in violation of a basic postulate of the First Amendment, is not necessary to give the public access to diversity of opinion upon public issues.

(2) The personal attack and political editorial regulations are more restrictive than necessary to protect any public interest in each licensee's presenting a variety of opinions upon controversial public questions.

1. *Government regulation of public affairs broadcasts, in violation of a basic postulate of the First Amendment, is not necessary to give the public access to diversity of opinion upon public issues.*

We wholeheartedly accept the Government's statement that "the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media" (Br. 53). The question is *not whether* the public interest in access to information and debate shall predominate, *but how* that interest shall be protected.

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lacy may be noted by way of anticipatory replication. The argument breaks down into three propositions:

(a) Since the spectrum is not wide enough to include all demands for its use, the Commission must make broad allocations between broadcasting and other uses such as fire, police, commercial communications, and broadcasting.

(b) A major purpose of allocating a large share of the spectrum to broadcasting is to enable the public to hear vigorous discussion and a wide variety of views upon controversial public issues.

(c) The personal attack and political editorial rules are necessary to "implement" the allocation.

The conclusion (c) does not follow from the premises (a) and (b). Frequencies can be allocated between broadcasting and other uses without regulating the content of broadcasts upon public issues. *A fortiori* allocation does not require a rule that every time any criticism of the personal characteristics of a public figure is broadcast, the licensee must provide free time for reply. All the Commission has to do, in order to make the allocation, is to take the facts as they are—to observe how far the broadcasting industry is, or is not, serving the public interest in the widest possible discus-

The basic postulate of the First Amendment is that the public will be best informed upon matters essential to self-government if debate is wide-open and uninhibited even though it includes biased and partisan expression. The Framers of the Constitution realized that individual members of the press might often be partisan, even scurrilous. Benjamin Franklin, apparently answering charges of unfairness, observed that a newspaper is not a stagecoach with seats for everyone.[27] James Madison noted: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[28] Robust debate cannot flourish if each publisher

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sion of public affairs—and then allocate to broadcasting in the light of competing demands, whatever share of the spectrum the Commission deems appropriate. Inability to impose the personal attack and political editorial regulations—or even the fairness doctrine—would in nowise impede the Commission's effective performance of the allocation and licensing function. Thus, our contention casts no doubt upon the basic licensing program under the Communications Act. Our argument is only that the Commission may not regulate the very ideas expressed in public affairs broadcasts, either directly by suppression or indirectly by attaching onerous obligations to their expression. This Court recognized the difference in Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 475—

> The Commission is given no supervisory control of the programs, of business management or of policy.

[27] Mott, *American Journalism* 55 (3d ed. 1962). Prior to the adoption of the First Amendment, the Framers of the Constitution, including Jefferson, Hamilton, Franklin and Madison, were subjected to scurrilous personal attacks by the press. In this period, which is often referred to as the period of the "party press," most newspapers were either Federalist or Republican and were devotedly one-sided. *Id.* at 71-162. The early history of this "new and rather wild journalism" (*id.* at 143) was by one contemporary's account "abominably gross and defamatory" (*id.* at 146).

[28] 4 *Elliot's Debates on the Federal Constitution* 571 (1876), quoted in New York Times Co. v. Sullivan, 376 U.S. at 271.

must think about being fair to his opponents.[29] Jefferson and Madison would have laughed at the suggestion that the *National Intelligencer* should open its pages to Federalist propaganda while Fenno turned the *Gazette's* Federalist vitriol into a balanced presentation. As the Court eloquently stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 310:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[30]

Overall fairness was left by the Framers to be achieved by the multiplicity and diversity of voices attendant upon freedom—not to government supervision of the fairness of individual publishers. The Court summarized the point in *Associated Press* v. *United States*, 326 U.S. 1, 20 ——

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[29] "It is most unlikely that public discussion will have [robust] muscle tone if each publisher must worry about being fair to both sides. * * * Think of a town meeting where the chair would rule that *each* speaker must be fair to both sides!" Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. Law & Econ. 15, 47 (1967). See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 137-38 (1967).

[30] In the *New York Times* case (376 U.S. at 273 n.13), the Court approved of John Stuart Mill's statement (Mill, *On Liberty* 47 (Blackwell ed. 1947)) that—

> to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith * * * that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.

> The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . .

In accordance with this view, *Mills* v. *Alabama,* 384 U.S. 214, rejected the attempt of a State government to impose a fairer mode of political discussion than unregulated expression. The statute prohibited the publication, on election day, of newspaper editorials supporting or opposing particular candidates. The State court upheld the law as a reasonable restriction that "protects the public from confusing last-minute charges and countercharges" (*id.* at 219)—much as the Commission seeks to justify its personal attack and political editorial regulations as means of protecting the public interest. If regulating the "fairness" of a debate upon public issues were a proper governmental function, much could be said in support of the State decision. The National Labor Relations Board has put a similar restriction upon speeches 24 hours prior to a representation election. *Peerless Plywood Co.,* 107 N.L.R.B. 427 (1953). This Court nevertheless struck down the statute as an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." 384 U.S. at 219.[31]

The rationale behind this view has been stated in other recent opinions. "Speech concerning public affairs is more than self-expression; it is the essence of self-government."

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[31] It seems most unlikely that the *Mills* decision rests upon the ground emphasized by the Government (Br. 53)—that the Alabama statute did not prevent last minute charges but did prevent effective reply. The opinion itself suggests that this point was irrelevant to the question of constitutionality. Furthermore, wherever the line is drawn and even if no line save the closing of the polls were established, there would be always charges too late for effective answer. Surely the aim of the statute was not to avoid "last minute charges," which is impossible, but to reduce their effect by securing the voters time for calmer reflection. Thus, the point of the decision must have been that the First Amendment leaves no room for government efforts to increase the fairness of political debate by inhibiting freedom of expression.

Garrison v. *Louisiana*, 379 U.S. at 74-75. Accordingly, the people—the ultimate rulers—protected their own ultimate power to govern by withholding from Congress—their legislative agent—all authority to regulate who may speak, or what he may say in the discussion of public affairs. As Madison explained, "[T]he censorial power is in the people over the Government, and not in the Government over the people" (4 Annals of Congress 934 (1794).[32] See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

The challenged regulations reverse the basic postulate of the First Amendment by imposing an official view of what kind of discussion will be best for the public in the radio and television industry. Radio and television broadcasters are not simply carriers; in dealing with public affairs, they serve the same journalistic functions as newspapers and magazines. It is their expression of their ideas that the regulations inhibit. In place of the interplay between robust and conflicting opinions, the Commission would limit the public to a fare of the bland fairness achieved by official scrutiny and governmental directives enforced by forfeitures, criminal prosecution and loss of license. The vagueness of the regulations, coupled with the burdensome obligations attached to "personal attacks" and political editorials, will force the industry to steer even wider of the dangerous zone and thus deny the "breathing space" required for effective expression. See *New York Times Co.* v. *Sullivan*, 376 U.S. at 271.

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[32] Madison said that the First Amendment "instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, meant a positive denial to Congress of any power whatever on the subject." 4 *Elliot's Debates on the Federal Constitution* 571 (1836). See *id.* at 572-73, 576; III Farrand, *Records of the Federal Convention of 1787* 256 (1911) (Charles Pinckney).

The undertaking to superintend the fairness of broadcast debate also unavoidably entangles the Commission in many of the evils of censorship. The Government speaks of "fairness" as if the standard were an objective truth, but the subjective nature of the Commission's determinations is demonstrable from the public record.

a. The rules concerning political editorials have undergone repeated change. Prior to 1940, broadcasters were free to editorialize without governmental restriction. From 1940 to 1949, the Commission forbade broadcasters to editorialize. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941). In 1949, editorializing became permissible, provided the broadcaster used good faith in arranging for opposing views. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In 1963, the Commission forbade editorials endorsing or opposing a political candidate, unless the broadcaster arranged time for the candidate or a spokesman to be designated by him to reply over the broadcaster's facilities at its expense. Public Notice, 25 P&F Radio Reg. 1899 (1963). In 1967, this restriction was embodied in the challenged regulation. Each of these rules involved a censorial decision upon how far and upon what conditions the Government thinks it desirable to allow an electronic journalist to speak his mind upon a political question.

b. The personal attack regulation also entangled the Commission in striking a subjective balance between the public interest (as the censor saw it) in access to fact and opinion, on the one hand, and, on the other hand, in a "balanced" presentation. As detailed in our Statement (p. 11), the modifications made in the personal attack regulation in August 1967 in order to exempt "hard news" reflect a consciousness that the initial effort to achieve "fairness" would deprive the public of prompt access to information. The amendments issued in March 1968 created additional exemptions in order to relieve a danger of inhibiting dis-

cussion which the Commission came to appreciate only after briefs had been filed in the court of appeals illustrating the inhibiting effects of the original regulation. On each occasion, the Commission was unavoidably exercising the censorial power of determining what balance between freedom and constraint upon expression was good for the people.

c. The actual application of the challenged regulations involves the Commission and its staff in detailed scrutiny of the content of programs and in borderline rulings involving subjective judgments upon the worth or desirability of the message.[33] The Commission has ruled that licensees are not required under the fairness doctrine "to make time available to communists or the communist viewpoint."[34] Similarly, atheists have largely been denied protection under the doctrine.[35] Indeed, the Commission's disparate treatment of fairness complaints by atheists and religious believers led Commissioner Loevinger to "suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation."[36] Although such dramatic rulings are infrequent, similar judgments upon whether a reply is worthwhile must inescapably infect staff rulings upon the applicability or inapplicability of such vague terms as "attack," "character," "personal qualities," and "identified . . . group."

In short, the political editorial and personal attack rules violate the basic postulates of the First Amendment both because they entangle the Commission in the role of a cen-

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[33] With regard to Commission "regulation by dossier," see Kalven, *op. cit. supra* note 29, 10 J. Law & Econ. at 21-23.

[34] Fairness Primer, 29 Fed. Reg. at 10418.

[35] Compare Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d 263 (1965), with Brandywine-Main Line Radio, Inc., 4 P & F Radio Reg. 2d 697 (1965); see R. 167a-75a.

[36] Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d at 269 (dissenting opinion).

sor and because they substitute an official view of fairness, applied individually to each licensee, in place of the Amendment's presupposition that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection" (L. Hand, J. in *United States* v. *Associated Press*, 52 F. Supp. 362, 372, S.D.N.Y. 1943, *aff'd*, 326 U.S. 1). The revolutionary character of the Government's argument is best appreciated by envisaging an application of the personal attack and political editorial rules to newspapers—a position from which the Solicitor General shrinks in part of his brief (Br. 45) but to which he necessarily returns in asserting that "the interests of the public . . . are not in every case necessarily served by simply relying upon an unregulated 'marketplace of ideas,' because that "marketplace is increasingly one for the affluent and powerful" (Br. 53). If the power to regulate the fairness of the press is claimed on this ground, candor requires acknowledging that it is just as applicable to newspapers as to radio stations. See pp. 45-51 below. The only authority cited by the Government acknowledges both the parallel and the possibility that the thesis requires a constitutional amendment.[37]

We do not suggest that this is necessarily the end of the present case. Circumstances can be imagined in which the media of expression are so few or control is so concentrated as to require a choice between imposing a fairness doctrine and leaving the public with access to only one point of view. Possibly, the basic postulate of the First Amendment would not apply under those conditions. Before any government regulation reversing the basic postulate could be sustained, however, there should be a clear showing of the gravest abuses, endangering paramount interests. *Cf. Thomas* v.

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[37] See Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1666-67 (1967), cited in Petitioners' Br. 56-57.

Collins, 323 U.S. 516; *Sherbert* v. *Verner*, 374 U.S. 398, 406.[38]

No such showing has been made in the present case. No characteristic of the broadcasting industry requires government regulation of public affairs programs in order to provide the public with access to full and fair debate upon controversial issues. A typical broadcasting station is one of many journalistic voices. The public interest in access to a variety of opinions is served by the opportunity to listen to many speakers, each guaranteed the freedom to present his views, fairly and objectively, or with vigorous bias and partisanship, in his journalistic discretion.

The fatal fallacy in the Commission's view is that it envisages members of the public as sitting glued to the programs of a single radio or television licensee, with access to conflicting opinions only if the Commission requires that licensee to present them. The image is totally false because (a) it understates the number of frequencies available and ignores other remedies for any concentration of control in the press; (b) it ignores the interplay between different media of expression; and (c) it misjudges the impact of personal attacks and political editorials upon the radio and television audience. Since the Commission's scarcity theory is wrong in fact, its constitutional argument collapses.

a. Whatever the validity of the assumption that a radio audience had few stations among which to choose in 1929,

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[38] The court of appeals apparently thought that the above principle would sustain an FCC ruling requiring broadcast stations to carry anti-cigarette smoking messages. Banzhaf v. Federal Communications Commission, D.C. Cir. No. 21,285, decided Nov. 21, 1968, *petition for certiorari pending sub nom*, Tobacco Institute v. Federal Communications Commission, No. 1036, Oct. Term, 1968. Thus, the holding in that case, whether sound or unsound, is entirely consistent with our position here.

it has been outmoded by radical changes in technology.[39] Today, access to the broadcasting medium is not so limited by its physical characteristics as to bar reliance on the libertarian assumption that "the widest possible dissemination of information from diverse and antagonistic sources," each free to exercise its own editorial judgment, is the best way to inform the public about controversial public issues. *Associated Press* v. *United States*, 326 U.S. 1, 20.

As of February 28, 1969, there were 6,894 commercial broadcasting stations on the air in the United States: 4,245 AM radio stations, 1,971 FM radio stations and 678 television stations. There were also 176 educational television stations and 365 educational FM stations. Public Notice, FCC Mimeo No. 28841, March 11, 1969. The number of commercial broadcasting stations is three times the approximately 1,763 daily newspapers (R. 117a). More than 1,000 UHF and VHF television channels and another 1,000 FM radio frequencies have been allocated to communities but are not being utilized (R. 117a; 47 C.F.R. § 73.202; Weekly AM-FM Addenda to Television Digest, Vol. 7:40, Oct. 2, 1967).

Scarcity is a relative term, with little meaning in the absence of a frame of reference. Using newspapers as his standard of comparison, FCC Commissioner Loevinger recently testified (*Hearings before the House Committee on Interstate and Foreign Commerce* (Agency Hearings)), 90th Cong., 1st Sess. 631 (1967):

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[39] This change in the technological foundation of the Commission's position has not gone unnoticed by the commentators. Thus, in *Note, Regulation of Program Content by the F.C.C.*, 77 Harv. L. Rev. 701 (1964), the authors observed in another context (77 Harv. L. Rev. at 705-06):

> The demand that each station present a balanced selection of programs seems to have been more compelling in the early days of radio and television than in an age when listeners may choose among a large number of AM, FM, VHF and UHF broadcasts.

> As a matter of fact, the diversity available through news reporting and editorializing by means of broadcasting is now in the order of three or four times the diversity available through newspapers. • • • There are something on the order of 4,000-plus different owners of broadcast properties in the country, there are . . . on the order of 12 to 1,400 newspaper owners in the country.

Although the gross number of broadcasting stations does not alone establish the number of voices heard in particular localities,[40] more exact calculations show that Commissioner Loevinger's comparison was conservatively stated. The number of electronic voices greatly exceeds the number of newspapers in nearly all urban, suburban, and rural areas. Furthermore, nearly every area, metropolitan or rural, receives the radio signals of powerful broadcasting stations located in other cities.

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[40] The following table, derived from U. S. Bureau of the Census, *County and City Data Book 1967*, Table 3; *Editor & Publisher International Yearbook, 1966;* Broadcasting Publications Inc., *Broadcasting Yearbook 1966;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1966 ed.), shows the situation then prevailing in the five largest metropolitan areas:

	1960 Population	Daily Newspapers	Broadcasting stations	AM	FM	TV
New York	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

A similar table (note 42, below) for metropolitan areas within the Seventh Circuit indicates that essentially similar conditions prevail in and around all cities.

Figures for rural areas cannot be obtained in the same degree of detail but the Statewide figures for representative predominantly rural States indicate that there can be very few localities in which

Technological advancements are likely still further to increase the supply of channels available for mass communications in the immediate future. The Department of Justice emphasized this point in a brief filed in the *ABC-ITT* merger case. Referring to such developments as coaxial cable, microwave, laser and satellite communications, it stated: [41]

> [T]here are now on the verge of technological feasibility a number of developments which would multiply the channels of access to the public, and thereby lead to more competition and more diversity in broadcasting. * * * These advances would enable broadcasting to develop free of the spectrum limitations on station outlets which are now the source of network scarcity and economic power.

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the number of newspapers of general circulation is even 50 percent of the number of broadcasting stations whose programs are received regularly:

State	Commercial Broadcast Stations on the Air (1-1-67)				Daily & Sunday Newspapers (1-1-68)	
	Total	AM	FM	TV	Daily	Sunday
Alaska	24	15	3	6	6	2
Kansas	89	59	19	11	51	14
Kentucky	145	98	40	7	28	13
Maine	48	33	8	7	9	1
Minnesota	113	81	21	11	29	8
Mississippi	112	87	17	8	19	7
Nevada	31	19	7	5	7	4
South Carolina	130	93	27	10	17	7
South Dakota	39	27	2	10	12	4

(Source: U.S. Bureau of the Census, *Statistical Abstract of the United States 1968* Nos. 739, 747.)

In both cases exact accuracy would require some allowance for common ownership of broadcasting stations, on the one hand, and newspapers, on the other.

[41] Brief for Appellant, United States v. Federal Communications Commission, D.C. Cir. No. 21147, Sept. 1967, at 72.

The Solicitor General's brief is thoroughly unfair to the court below when it asserts (Br. 45) that the Seventh Circuit "made much of figures showing the gross number of radio and television stations in the United States now exceeds the number of general circulation newspapers," and then criticizes the court on the ground that "this raw comparison of numbers ignores the physical limitations on the service area of any particular station." The court of appeals was not so naive. The opinion mentions the gross figures, but its conclusion was based upon such information as a footnoted table (R. 367a) showing the ratio of newspapers to broadcasting stations on the air in representative metropolitan areas—which the Government neglects to mention.[42] There were also before the court a number of tables prepared from standard statistical sources comparing for other metropolitan areas and also State by State the number of newspapers and broadcasting stations.[43] It seems extraordinary that the Government should seek to cloud the simple fact that the number of radio stations that can be heard in almost every locality in the United States is

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[42] The table was as follows (R. 367a):

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book, 1967;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *Broadcasting Yearbook 1967.)*

[43] The summary tables appearing at note 40, above, illustrate the data.

greater than the number of newspapers having any significant circulation.

The other arguments addressed to this point are equally unpersuasive. There is no reason to count weekly newspapers, magazines and books as alternative sources of fact and opinion for newspaper readers (Br. 45) and exclude them in arguing that governmental supervision over radio is needed to secure radio listeners access to a variety of opinions. The service area of a particular station cannot fairly be compared with the supposedly limitless number of people with access to a newspaper (Br. 45). The only fair comparison is between the service area of broadcasting stations and the circulation area of the daily press. The theoretical power of a newspaper to add additional pages gives no assurance that it will voluntarily present a greater variety of opinion than a radio or television station whose programs must be broadcast one at a time and are limited to 24 hours a day or less (Br. 46). The fact that there are sometimes more applicants than available frequencies (Br. 47-48) has no tendency to show that the number of stations on the air is not enough to provide diversity of opinion, even without regard to other media.

The Government also argues (Br. 45) that "in the case of most television and much radio broadcasting, the programming received by the public . . . emanates primarily from a handful of network sources." Whatever the networks' situation may be,[43a] however, it is utterly irrelevant in the present case. The Commission made no finding concerning it. We deal here with general rules. The rules apply to individual licensees as well as networks; to radio as well as television; to local programs as well as network coverage; to broadcasters in areas where there are nine television stations and 70 radio stations as well as areas where there is one. The stations which are respondents in the *RTNDA* case are seeking individual freedom to

[43a] NBC deals with the situation of the networks in its separate brief.

editorialize about political candidates. Red Lion is a radio station, and the program of which the Commission complains did not originate with a network. Indeed, the reported decisions involving complaints under the personal attack and political editorial rules predominantly involve local programs dealing with local issues.[44] Since the Commission chose to eschew both selectivity and investigation of the facts,[45] the rules must fall for overbreadth if they are invalid in any application. *United States* v. *Robel,* 389 U.S. 258, 266; *Brown* v. *Louisiana,* 383 U.S. 131, 143, 147-148 (Justice Brennan concurring); *Cox* v. *Louisiana,* 379 U. S. 536; *Thornhill* v. *Alabama,* 310 U.S. 88.

To the extent that there is danger that consolidation of control and economies of scale may lessen diversity of expression, the Commission has other means of promoting diversity than the abrogation of First Amendment rights.[46] The Commission has already adopted regulations limiting the power of networks,[47] and other rules restricting multiple ownership of broadcast stations in order to permit a greater number of independent voices to be heard.[48] Should further

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[44] See examples in Fairness Primer, 29 Fed. Reg. 10415.

[45] See pp. 77-81, below.

[46] No person may hold a direct or indirect financial interest in more than seven AM stations, seven FM stations and seven television stations (no more than five of which may be in the VHF band). In addition, the Commission may determine that there is a "concentration of control" in a licensee even if he owns fewer than the maximum number of stations permitted. The Commission's regulations also prohibit single ownership of stations with "overlapping" signals. 47 C.F.R. §§ 73.35, 73.240, 73.636. It is the policy of the Commission in comparative hearings for broadcast station permits to give a preference to the applicant who does not already own, or who owns fewest, other media of mass communications. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

[47] National Broadcasting Co. v. United States, 319 U.S. 190.

[48] Amendment of Multiple Ownership Rules, 9 P & F Radio Reg. 1563 (1953); see United States v. Storer Broadcasting Co., 351 U.S. 192.

economic measures be needed to deal with a proven danger of concentration, the *NBC* case [49] would probably sustain their constitutionality.

But the existence of power to prevent monopoly in the media of communication does not sustain the power to inhibit the press in expressing views upon public issues by attaching obligations to the expression of some kinds of ideas. The Solicitor General's reliance (Br. 52-55) upon *Associated Press* v. *United States,* 326 U.S. 1, and *National Broadcasting Co.* v. *United States,* 319 U.S. 190, ignores the most elementary distinction in the law of the First Amendment.[50] Those cases deal exclusively with business practices, with economic organization or control.[51] No one denies

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[49] 319 U.S. 190.

[50] See Robinson, *op. cit. supra* note 29, 52 Minn. L. Rev. at 143:

> There is . . . a marked difference between regulation of the economic structure of a communications industry which is designed to protect the basic minimum conditions in which free, diversified speech may develop and regulation which attempts directly to ensure such diversified speech by examining the speech itself to see if it meets the tests of balance, fairness and diversity.

The Court in *Associated Press* specifically noted that neither AP nor its members were being compelled "to permit publication of anything which their 'reason' tells them should not be published." 326 U.S. at 20 n. 18. In the three-judge court, Judge Learned Hand observed that under the antitrust decree the newspaper publisher "remains unfettered in his selection of what to publish." 52 F. Supp. 362, 374 (S.D.N.Y. 1943).

[51] The Commission has frequently cited the *National Broadcasting* case in support of the fairness doctrine and personal attack and political editorial regulations because the opinion observed that the Commission is not merely a traffic officer policing the airwaves to prevent technical interference but has the burden of determining the "composition of that traffic". (319 U.S. at 215-16). But the case involved no issue of program content, nor any restriction of a licensee's freedom of expression. In rejecting the contention that the First Amendment secured the position of the networks in their economic domination of local stations, Mr. Justice Frankfurter observed that, "freedom of utterance is abridged to many who wish

that all branches of the press are constitutionally subject to regulation of their business practices in the same manner as other industries.[52] This case deals with regulation based upon what ideas of public significance the press chooses to express. This Court has never sustained the government in such a claim of censorial power, keyed to speech itself.

b. In deciding whether a scarcity of available broadcasting channels requires abandoning the fundamental postulate of the First Amendment in order to protect the public's right to diversity of opinion, one cannot fairly look at broadcasting in isolation. People also gather information and opinion from newspapers, magazines, books, public

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to use the limited facilities of radio'' and that ''radio inherently is not available to all'' (*id.* at 226). But the focus of this generalization was quickly made clear (*id.* at 226-27):

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of ''public interest''), is thereby denying such persons the constitutional right to free speech. * * * Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Thus, the actual decision parallels Associated Press v. United States, 326 U.S. 1, where the Court sustained the application of the Sherman Act to a news-gathering service. The opinion asserted the basic First Amendment policy that there should be the ''widest possible dissemination of information from diverse and antagonistic sources'' (*id.* at 20). The *NBC* case merely sustained the Commission's power to preserve opportunities for diversity in the broadcasting industry against private concentrations of economic power. See Kalven, *op. cit. supra* note 29, 10 J. Law & Econ. at 41-45.

[52] Lorain Journal v. United States, 342 U.S. 143 (antitrust laws); Associated Press v. Labor Board, 301 U.S. 103 (labor relations); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (wages and hours); see Grosjean v. American Press Co., 297 U.S. 233, 250 (ordinary personal or business taxes).

meetings, and other sources.[53] The several media are not perfect equivalents, but they are, to a very considerable extent, alternative ways of reaching the same general public. Experience shows that political dialog often crosses the boundaries between the media. In the *Red Lion* case, Cook published a book, *Goldwater—Extremist on the Right.* Later radio programs broadcast by Red Lion supported Goldwater. The magazine *The Nation* later published an article by Cook entitled "Radio Right: Hate Clubs of the Air," in which Cook attacked such licensees as Red Lion and the programs arranged by Hargis. The Red Lion audience undoubtedly had access to both the article and the book. The Democratic National Committee sent out reprints of the article. Red Lion, under FCC pressure, gave the Democratic National Committee time to broadcast a taped discussion entitled "Hate Clubs of the Air." Later, Hargis made the radio "attack" upon Cook. Only a rash man could assert whether Cook's view or Hargis' opinion received easier access to the public or wider attention. Yet it seems safe to say that the debate was far more robust than it would have been if the publishers and distributors of the book, the magazine *The Nation,* and the broadcast licensee had each known at the time of publication that it would be required to conform to a standard of fairness imposed by government regulation.

c. The Commission's supposition that the political editorial and personal attack rules result in something like a public debate before the same audience makes unwarranted assumptions concerning the character and interests of radio and television audiences. There is no reason to believe that the same radio or television audience that hears a

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[53] The record (R. 103a) shows also that there were in 1965 or prior thereto 1,763 daily newspapers, approximately 478 weekly periodicals with the total circulation of approximately 105 million, 1,445 monthly periodicals with a total circulation of 185 million, and 666 general monthly and weekly consumer magazines with a total annual circulation of 4,781,310,000.

political editorial or personal criticism of a public figure will also hear a reply broadcast by the same station. The extent to which the two audiences overlap will depend upon unknown variables, such as the day of the week and the hour of each broadcast and the extent to which the program or station commands a constant following. To the extent that the audiences are different, each hears only a one-sided presentation. A careful scholar recently commented—

> In the absence of more precise information than I have, I can only speculate as to its validity. *I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.* My questions go, of course, only to degree. Undoubtedly there are insulated listeners but what I question is that the typical listener is thus insulated, that is to say, that he hears and knows only what is broadcast. Furthermore, I would conceive of most listeners—and particularly those whose mental habits incline them exclusively to listening—as casual listeners. The impact of any one communication on a casual listener would not be great. If the communication is a particularly startling one, it may have a greater effect, but by the same token—i.e., its exceptional character—it is unlikely that it will go unchallenged if not on a subsequent broadcast then by means of one or another formal or informal avenue of communication. Furthermore, in these same terms, I think that *the case for the value of the broadcast reply is much weaker than it is assumed to be.* Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. In short, I would conclude that the autonomy of TV and radio have been much overstated.

Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change* 2-3 (U.S. Government Printing Office, 1968) (emphasis supplied).

> The present number of broadcast licensees, the opportunities for interplay of debate across the lines between the media, and the dubiety of assumptions concerning the character of the "insulated listener" prevent making a rational constitutional distinction between broadcasting and other media of communication in respect to regulation of the substance of debate upon public issues.

This is enough to invalidate the Commission's effort to legislate "fairness" through generally applicable personal attack and political editorial regulations. If evidence is brought forward of network power or unique situations in which the justification may be stronger, it will then be time enough to consider the constitutionality of a measure narrowly drawn to meet the particular evil.

2. *The regulations are unconstitutional, even if the fairness doctrine is generally valid, because they inhibit broadcast debate more than is necessary to secure from each licensee a fair presentation of public issues.*

The court below did not rule upon the constitutionality of the "fairness doctrine" (R. 365a) because it was satisfied that the vagueness of the challenged regulations, coupled with their pervasive requirements and severe sanctions, rendered them more restrictive than necessary to effectuate any public interest in the balanced presentation of controversial issues. We submit that the court's approach and conclusion are correct as applied to both *Red Lion* and the instant case.[54]

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[54] *Red Lion* involves not the original fairness doctrine but a special personal attack principle announced in 1963.

The personal attack rule is more restrictive than the general fairness policy propounded in 1949 in three respects:

First, the fairness doctrine looked only to the overall character of a licensee's performance. There was to be no effort, as the doctrine was originally propounded, to regulate the content of any particular broadcast or to attach obligations to any particular expression.[55]. The *Report on Editorializing* stated (13 F.C.C. at 1255, emphasis supplied):

> "While this Commission and its predecessor . . . have . . . properly considered that a licensee's *over-all program service* is one of the primary indicia of his ability to serve the public interest, actual consideration of such service has always been limited to a determination as to whether the licensee's programming, taken *as a whole*, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. *The action of the station in carrying or refusing to carry any particular program is of relevance only as to the station's actions with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.*"

The personal attack rule applies an automatic formula to any broadcast that includes criticism of the "honesty, character, integrity or like personal qualities of an identified person or group," even though the so-called "attack" is part of a balanced presentation of a particular subject.

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[55] The censor's temptation to ignore the limitations of the basic principle in cases where he is convinced of the "right" view are illustrated by a recent case in which the Commission disposed of a complaint against a broadcaster by finding that the broadcaster had acted in good faith in determining that it had complied with the fairness doctrine but that the broadcaster had nevertheless erred and should provide time for the expression of an opposing viewpoint. Time-Life Broadcast, Inc., 15 P & F Radio Reg. 2d 737 (1969).

We have already shown how, under the regulations, the CBS documentary describing the Ku Klux Klan would open every licensee in the network to liability to give at least four individuals free time for reply, even though the program fairly presented leaders as well as critics of the Klan (n. 22, above). The Eric Sevareid broadcast upon Henry R. Luce's contributions to American journalism (p. 32, above) was surely a sincere effort to give a balanced appraisal of the influence of Mr. Luce and *Time* magazine, yet such an analysis would probably fall under the personal attack rule. The documentary upon Robert Kennedy appearing at R. II 119-23 was also a fair presentation, yet today due to the rigidity of the challenged regulation, failure to furnish notice, a transcript, and free air time for reply on at least two or three specific points would violate the regulation. See pp. 29-31, above. Such item by item scrutiny, attaching obligations to each offending item regardless of the overall tenor of programming, is a great deal more restrictive than necessary to provide a variety of views upon public issues.[56]

Second, where the fairness doctrine required only an "honest and reasonable effort" to present varying opinion upon controversial issues, the personal attack and political editorial rules leave no room for journalistic judgment upon the part of anyone but the Commission. The *Report on Editorializing* stated (13 F.C.C. at 1255):

> But it is clear that the standard of the public interest is not so rigid that an honest mistake or error in judgment will be or should be condemned where his overall record demonstrates a reasonable effort to provide a

[56] To this extent the real concern of the Commission seems to be to provide the individual with a remedy for possible defamation rather than to secure public access to diverse views upon public issues. See also Petitioners' Br. 50. This private interest is insufficient to justify the inhibition upon expression. New York Times Co. v. Sullivan, 376 U. S. 254; Rosenblatt v. Baer, 383 U. S. 75; Time, Inc. v. Hill, 385 U. S. 374.

> balanced presentation of comment and opinion upon such issues. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved.

The personal attack and political editorial regulations do establish a rigid rule. If the FCC staff concludes that a broadcast included a personal attack, the licensee will not be excused from giving free time for reply by the nicety of the question, the uncertain meaning of the regulation, or a sincere and reasonable belief that no attack was involved. The Commission and its staff stand ready at all times to impose the burden of financial loss and program disruption upon the basis of their own *ex post facto* determinations. Nor does the Commission hesitate, under the political editorial regulation, to substitute its own precise instruction for the judgment of the licensee.[57]

Third, the vagueness of the personal attack regulation increases its inhibitory effect. The critical language is the definition of personal attack:

> an attack . . . made upon the honesty, character, integrity or like personal qualities of an identified person or group. . . .

The definition combines multiple uncertainties.

a. The regulation does not define what constitutes the making of an "attack." The term could refer narrowly

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[57] The degree of detailed program supervision likely to be undertaken by the Commission under the challenged regulations is well exemplified by its rejection of a station's decision to divide an agreed-upon total of 120 seconds of editorial endorsement reply time into 6 announcements of 20 seconds each, instead of dividing the same total time into a greater number of announcements of proportionately shorter duration, as requested by the political candidate making the reply. The Commission, which had ordered the station to "negotiate in good faith" with the candidate, said that the station failed to give reasons for its decision. Letter to KING Broadcasting Co., 11 P & F Radio Reg. 2d 628 (1967).

to those instances in which the speaker is expressing his own critical opinion about some personal quality of an individual or group. Alternatively, it could refer more broadly to statements describing without endorsement someone else's opinion on the subject. It could also apply to a question in which one speaker asks another whether he agrees with the derogatory opinion of some third party.

b. The term "character" embraces a multitude of qualities. The definitions in the *Oxford English Dictionary* that fit the context include:

> The sum of the moral and mental qualities which distinguish an individual or a race, viewed as an homogeneous whole; the individuality impressed by nature and habit on man or nation; mental or moral constitution.
>
> Moral qualities strongly developed or strikingly displayed. . . .
>
> The estimate formed of a person's qualities; reputation. . . .

Under the above definitions, any comment reflecting adversely upon any quality or characteristic of an individual or group may be an attack on his or its "character."

c. The term "like personal qualities" gives the entire phrase virtually boundless meaning. It is hard to think of any human quality that is not embraced by these vague and expansive terms. No one could say in advance whether it was an attack upon Robert F. Kennedy's "character or like personal qualities" to describe him as "ruthless," "abrasive," "trying to ride upon the name of President John F. Kennedy," or "not over scrupulous about the means that he employs."[58] Did Eric Hoffer impugn the character and personal qualities of "that misbegotten Cleaver" by also calling him a "sewer rat"?[59] Was it a

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[58] R. II 120, 122.

[59] CBS Television, "The Savage Heart—A Conversation With Eric Hoffer," (CBS News Special, with Eric Sevareid) broadcast on Jan. 28, 1969.

personal attack for Hoffer to label Eugene McCarthy "vain" and "un-American"?[60] Similar uncertainty would arise from the repetition of such phrases as "black Judas,"[61] or "one of the number one racists,"[62] or "Old Yo-Yo—you never know where he stands."[63]

d. Equally perplexing problems arise in determining who is an "identified individual" and what is an "identified group." For example, does a reference by Senator Long to "sensation-seeking columnists" in the Dodd case identify Drew Pearson and Jack Anderson?[64] Does a reference by Stokely Carmichael to the "white racist policeman" who shot a Negro driving his pregnant wife to a Los Angeles Hospital identify the particular policeman involved in the initial incident of the Watts riot?[65] In the same program did Mr. Carmichael's reference to the Polish-American citizens of Cicero, Illinois, as "savages" entitle some group to reply?[66] If so, does the group consist of all Polish-Americans, or all citizens of Cicero, or all Polish-American citizens of Cicero? Whatever the answer, to whom should the notice and invitation to reply be addressed? To whom, if anyone, was a licensee to send notice when Eric Hoffer called "all these young McCarthyites" "the most treacherous people in the world."[67]

The Commission itself virtually acknowledged the vagueness of the personal attack doctrine in promulgating the regulations (R. 215a; emphasis supplied):

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[60] *Ibid.*

[61] R. II Supp. Exh. 66.

[62] R. II Supp. Exh. 67.

[63] R. II 65.

[64] R. II 75.

[65] R. II 107.

[66] R. II 109.

[67] *Op. cit. supra* note 59.

> [W]e recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal . . . attack has occurred in the context of a discussion of a controversial issue of public importance; or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.*

The difficulties of licensees charged with complying with rules that "are not designed to answer such questions" are not eased by the Commission's invitation to consult its staff for interpretations (R. 215a, n. 6). A licensee carrying an interview of Eric Hoffer by Eric Sevareid cannot suspend the broadcast while he asks counsel to obtain an FCC ruling upon whether Hoffer's describing "some of these new young Negro leaders, like Stokely Carmichael" as "all phonies" asking gifts of "cans of power" is a personal attack.[68] Commentaries, even when not broadcast as part of a newscast, must be freshly prepared against pressing deadlines. Even documentaries are produced under the urgent pressure of events.[69] There is simply no opportunity for advance clarification of the application of the vague terms of the regulation to specific words of particular broadcast discussion of public affairs.

Apparently the Commission contemplates retrospective clarification after the broadcast has occurred, for it says that the one week allowed for giving notice and offering an opportunity to reply "should be sufficient to allow a licensee to confer with his counsel or with the Commission if there is doubt as to its obligation" (R. 217a). *Post hoc* clarification may enable the licensee to avoid legal proceedings and forfeitures by disrupting its programming and surrendering revenue in order to give the person found to

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[68] CBS Television, "Eric Hoffer: The Passionate State of Mind," (CBS News Special, with Eric Sevareid) broadcast on Sept. 19, 1967.

[69] Wood, *Electronic Journalism* 46-49 (1967).

have been attacked free time for reply, but the obligations are fixed by the broadcast. It is at the time of the broadcast that the licensee (actually, the producer, editor, commentator, or guest speaker) needs to know when the regulation applies, in order to avoid the distasteful and onerous obligations. Regulation in the area of speech and press is unconstitutional unless it clearly describes the conduct affected. *Whitehill* v. *Elkins,* 389 U.S. 54; *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Ashton* v. *Kentucky,* 384 U.S. 195, 200; *Smith* v. *California,* 361 U.S. 147, 151.

In the present context the vagueness of the regulations also eliminates the breathing space necessary to broadcasting robust debate upon controversial public issues. The producers, writers, editors, and commentators who serve the electronic press not only must steer clear of actual personal attacks in order to spare licensees the burden of the attendant obligations, but they must avoid anything that the Commission might subsequently bring within the vague confines of the regulation. Under such conditions, there is no room for the incisive and vigorous debate guaranteed by the First Amendment.

The Commission's declared intention not to seek sanctions against all violations (R. 215a-16a) does not relieve the evil. The declaration itself is unclear. Probably, it means only that in doubtful cases there will be no penalty for failing to give notice and offer time for reply pending a Commission ruling. In that event, the latitude is illusory because the bite comes when the Commission requires the offer. If, on the other hand, the declaration means that the Commission will exercise latitude in deciding when to enforce the regulation, then the Commission would, as the court below observed (R. 369a-70a), "impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees, who engage in 'willful or repeated' acts of unfairness." This Court has repeatedly invalidated statutes written to sweep with an all-encompassing net so that local functionaries could pick and

choose whom they wished to prosecute. *E.g., Cox* v. *Louisiana,* 379 U.S. 536, 557-58; *Saia* v. *New York,* 334 U.S. 558, 562; *Cantwell* v. *Connecticut,* 310 U.S. 296. The same rule should apply to the Federal Communications Commission.

The First Amendment condemns any inhibition upon speech which is more restrictive than necessary to secure the allegedly paramount interest. *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508; *NAACP* v. *Alabama,* 377 U.S. 288, 307; *Shelton* v. *Tucker,* 364 U.S. 479, 488. The personal attack and political editorial regulations are more restrictive than the original fairness doctrine. The Commission asserts that the reasons for the more severe restrictions are a need for procedural specificity and additional sanctions (R. 210a, 214a). Neither will support the additional substantive restrictions upon journalistic freedom of expression.

II

THE PERSONAL ATTACK AND POLITICAL EDITORIAL REGULATIONS ARE NOT AUTHORIZED BY THE COMMUNICATIONS ACT

The provisions of the Communications Act, the history of Congressional consideration of public affairs broadcasting, and the principle that administrative power to curtail the liberties of speech and press depends upon the most explicit legislative authorization demonstrate that the challenged regulations are void for want of statutory authorization.

A. The Communications Act, as enacted in 1934, contained three provisions cited by the Government delegating rule-making power to the Commission: Sections 4(i), 303(r) and 315(c).

Section 315(c) (Appendix A, p. 4a, below) can be dismissed at the outset. Subdivisions (a) and (b), as first enacted, imposed upon any broadcaster who permitted a political candidate to use its facilities the duty to make the

same facilities available to his opponents upon equal terms. Subdivision (c) directed the Commission to prescribe "rules and regulations appropriate to carry out the provisions of this section." Since "the provisions of this section" dealt only with the time accorded to political candidates, regulations dealing with any political editorial and any personal attack during any discussion of a public issue obviously go beyond carrying out the provisions of that section.

Section 4(i) and 303(r) (Appendix A, p. 1a, below) are couched in general terms. The former provides that the Commission may make—

> such rules and regulations not inconsistent with this Act as may be necessary in the execution of its functions.

The latter section grants power to issue—

> such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act.

The Act nowhere suggests that policing the contents of public affairs broadcasts is one of the Commission's functions. No provision of the Act imposes upon a licensee any specific duties in regard to its programs except for according equal time to political candidates. The Commission finds the power in the very general instruction that it is to be guided by the "public interest, convenience, necessity" in acting upon applications for grant and transfer of licenses. Communications Act of 1934 Section 307(a), 309(a), 310(b), 47 U.S.C. §§ 307(a), 309(a), 310(b). It is too long a leap from the prescribed use of this standard in licensing to the conclusion that the Commission may issue any regulation about the substance of programs that it finds will serve the public interest. As the Court observed in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475—

> The Commission is given no supervisory control of the programs, of business management or of policy.[70]

See *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 500-01 (1st Cir. 1950); 1 Socolow, *Law of Radio Broadcasting* §§ 214-19 (1939).

Section 326 makes clear the limitation on the Commission's authority. It explicitly denies "the power of censorship over the radio communications or signals transmitted by any radio station," and declares that—

> no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The regulations attach onerous conditions to support of a candidate for election or criticism of a public figure. Imposing an onerous condition upon the broadcast of fact or opinion obviously "interferes" with freedom of expression. See pp. 29-35, above.

B. During the debates upon the Radio Act of 1927 and the Communications Act of 1934 Congress repeatedly rejected proposals to subject broadcasters to the kind of obligation imposed by the challenged regulations. In the 1927 House debate, after the view was expressed that the Commission was to have "no power at all" to control the licensee's exercise of free speech, Congressman Blanton asked: "What is the committee going to do as to . . . political attacks over the radio and regulating or controlling political attacks of one party upon another or one individual upon another?" Congressman White replied that the bill

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[70] See McIntire v. Wm. Penn Broadcasting Co., 151 F. 2d 597, 599 (3rd Cir. 1945), *certiorari denied*, 327 U. S. 779:

> It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC.

"does not deal with that specifically" 67 Cong. Rec. 5480 (1926).[71]

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[71] Congressman White had incorporated a provision giving the Commission this power in a previous bill (H. R. 7357, 68th Cong., 1st Sess. (1924)), but he stated that he had deleted this provision from the current bill because so many had expressed the fear that this power to interfere with licensee program selection was "akin to that of censorship." *Hearings on H. R. 5589 Before the House Committee on the Merchant Marine, Radio and Fisheries,* 69th Cong., 1st Sess. 39-40 (1926).

On the floor of the House, Congressman Davis opposed the Radio Bill because, in his opinion, it did not go far enough in limiting broadcasters' editorial discretion. Explaining the common carrier provision, which he proposed, Congressman Davis stated: "I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all. As it stands now they are absolutely the arbiters of the air.

"They can permit one candidate to be heard through their broadcasting stations and refuse to grant the same privilege to his opponent. They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing. They can charge one man an exorbitant price and permit another man to broadcast free or at a nominal price. There is absolutely no restriction whatever upon the arbitrary methods that can be employed, and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy." 67 Cong. Rec. 5483 (1926).

As an example of industry practice Congressman Davis quoted the testimony of one broadcaster at the hearings to the effect that radio stations edited just like newspapers and felt free to accept or reject any material presented to them as they thought best. 67 Cong. Rec. 5484 (1926). Congressman Davis' proposal was ruled out of order as not germane. 67 Cong. Rec. 5566 (1926).

Congress did adopt a provision authorizing the Radio Commission to revoke a license upon certification by the Interstate Commerce Commission "that a licensee has been guilty of any discrimination either as to charge or as to service." 44 Stat. 1162, 1168. But it was understood that the provision would have no effect unless the

The Senate Committee, concerned about the possibility that some broadcasters would program important questions in a one-sided manner, amended the bill to provide that, whenever a licensee permitted the use of his station by any candidate for public office or broadcast the discussion of any question affecting the public, his station should be deemed a common carrier and compelled to afford time for reply. 67 Cong. Rec. 12503 (1926). On the floor, the Senate rejected the idea of imposing the duty to present both sides of an issue; it substituted an amendment requiring only that equal opportunities be afforded when a political candidate was permitted to use broadcasting facilities. Senator Dill led the opposition to the Committee proposal because he feared that if discretion were taken away from licensees in this area, they "would have to give all their time to that kind of discussion, or no public question could be discussed." 67 Cong. Rec. 12504 (1926). The debate and vote make it plain that the requirement of equal time for actual candidates was the limit of the obligations Congress was willing to impose.

Interstate Commerce Commission first concluded that broadcasters were "common carriers" subject to its jurisdiction. It was also understood that the ICC had never asserted such jurisdiction. See 68 Cong. Rec. 2567 (1927). See also 67 Cong. Rec. 5559 (1926). Congressman Scott, leader of the House conferees, defended the bill against complaints that it did not go far enough to prevent discrimination by broadcasters, saying: "Yes; and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567 (1927). In any event, this provision was deleted without comment when Congress enacted the Communications Act of 1934. See 48 Stat. 1064 (1934). Indeed, in 1934 Congress specifically provided that "a person engaged in radio broadcasting . . . shall not be deemed a common carrier." 48 Stat. 1064, 1066, 47 U. S. C. § 153(h).

In 1933 Congress adopted a bill (H.R. 7716, 72d Cong., 2d Sess. (1933)) which would have amended the equal-time-for-political-candidates requirement by extending it to all presentations "in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . . ." The report of the House conferees stated: "This amendment broadens section 18 . . . [It is] designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office, or in the presentation of views on public questions." H.R. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). The proposed amendment would have imposed the same duties as the present political editorial regulation. The bill was vetoed by President Hoover.

The view now advanced by the Government was proposed and rejected a third time during the Congressional consideration of the Communications Act of 1934. A pending House bill would have forbidden broadcasters to deny use of their facilities to groups espousing viewpoints with which they disagreed. This provision was rejected, at least in part because Chairman Sykes of the Radio Commission raised the objection that it deprived the broadcasters of editorial discretion. Chairman Sykes was also questioned about the powers of the Commission in a personal attack situation. He took the position that the Commission had no right to prevent the broadcast of personal attacks, but that, if a station broadcast a series of attacks, at license renewal time the Commission could weigh this in the context of the station's overall programming. No suggestion was made that the Commission had power, or should be given power, to compel a broadcaster to afford time for reply. *Hearings on H.R. 7986 Before the House Committee on Merchant Marine, Radio and Fisheries*, 73d Cong., 2d Sess. 188-89 (1934).

In the Senate the language of Section 315 was broadened to make the equal-time-for-political-candidates requirement

applicable "in the presentation of views on a public question to be voted upon at any election, or by a government agency." S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934). The House rejected the Senate amendment, however, and the equal time provision was limited to broadcasts by political candidates for election. See H.R. Rep. No. 1918, 73d Cong., 2d Sess. 26, 49 (1934).

In sum, the challenged regulations impose precisely the kind of government interference with broadcasters' freedom of expression that the legislative process thrice rejected.[72]

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[72] On numerous occasions, Congress has refused to adopt proposals that would have restricted licensee programming discretion. See H. R. 14467, 70th Cong., 2d Sess. (1928) (common carrier provision); S. 6, 71st Cong., 1st Sess. (1929) (equal opportunities for candidates, their spokesmen and political parties); H. R. 5716, 71st Cong., 2d Sess. (1929) (similar); H. R. 6227, 73d Cong., 2d Sess. (1934) (common carrier provision); H. R. 9121, 73d Cong., 2d Sess. (1934) (25% of broadcast time must be allotted to public service associations); H. R. 9230 and 9231, 74th Cong., 1st Sess. (1935) (required that regular time be set aside for public affairs discussions and that licensees keep records on applications for time, rejections, and the reasons for the rejections); H. R. 3033 and 3039, 75th Cong., 1st Sess. (1937) (similar); S. 2755 and 2756, 75th Cong., 1st Sess. (1937) (similar); S. 635 and 636, 76th Cong., 1st Sess. (1939) (similar); S. 1806, 77th Cong., 1st Sess. (1941) (equal opportunities must be afforded opposing parties when public officials discuss public questions); S. 814, 78th Cong., 1st Sess. (1943) (similar); H. R. 3716, 79th Cong., 1st Sess. (1945) (common carrier provision); H. R. 4314, 79th Cong., 1st Sess. (1945) (Commission to fix percentage of time allocated to public service programs); H. R. 1936, 80th Cong., 1st Sess. (1947) (similar); H. R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for candidates, their spokesmen, political parties, when referendum questions are discussed, and for the discussion of differing viewpoints on public questions); S. 1333, 80th Cong., 1st Sess. (1947) (similar); H. R. 6949, 81st Cong., 2d Sess. (1950) (equal opportunities for candidates, their spokesmen or when referendum questions are discussed); H. R. 3543, 82d Cong., 1st Sess. (1951) (fixed percentage of time must be allocated to public

C. The 1959 amendment to section 315 does not alter the situation. The amendment resulted from a Commission ruling in the *Lar Daly* case,[73] to the effect that a news or news-related broadcast showing a candidate speaking on a public occasion was a "use" of its facilities that required giving equal time to every other candidate for the same office. In order to relieve broadcasters of this straightjacket, Congress made the equal time requirement of section 315 inapplicable to bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of bona fide news events. At the same time Congress, in order to prevent abuse of the new exemption, added a declaration that—

> "Nothing [in the exception] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on the issues of public importance.

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service programs); H. R. 5470, 82d Cong., 1st Sess. (1951) (equal opportunities required for candidates or their spokesmen); S. 1379, 82d Cong., 1st Sess. (1951) (similar); H. R. 7062, 82d Cong., 2d Sess. (1952) (similar); S. 2539, 82d Cong., 2d Sess. (1952) (similar); H. R. 11851, 87th Cong., 2d Sess. (1962) (opportunity for response required when an individual is subjected to ridicule by a candidate utilizing time pursuant to Section 315); H. R. 7072, 88th Cong., 1st Sess. (1963) (equal opportunity to be afforded opponent when station editorializes favoring one candidate or opposing his opponent); H. R. 7612, 88th Cong., 1st Sess. (1963) (similar to H. R. 11851, 87th Cong., 2d Sess.); H. R. 10135, 88th Cong., 2d Sess. (1964) (similar to H. R. 7072, 88th Cong., 1st Sess. (1963)); H. R. 5415, 89th Cong., 1st Sess. (1965) (similar to H. R. 11851, 87th Cong., 2d Sess.). See also H. R. 7716, 72d Cong., 1st Sess. (1931) (similar to H. R. 6949, 81st Cong., 2d Sess. (1950)), which passed both houses of Congress but was pocket-vetoed.

[73] Columbia Broadcasting System, Inc., 18 P & F Radio Reg. 238 (1959).

Even if the 1959 amendment to Section 315 gives a backhanded approval to the fairness doctrine,[74] it grants no

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[74] It seems highly unlikely that Congress intended the proviso to provide statutory authority for the entire fairness doctrine. Section 315 deals only with the presentation of political candidates. The proviso, like the exemption, deals only with various forms of news programs. The only reference to the fairness doctrine is the proviso confining the effects of the exemption. A proviso guarding against too expansive construction of a new exemption is a strange place in which to delegate new authority.

Although the excerpts from the debate quoted by the Government (Br. 18-22) support its contention when read in isolation, a staff study for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce concluded:

> The ensuing discussion on the floor of the House indicates *the great majority of the Members thought of the proposed legislation solely as a measure relating to appearance by political candidates.* The House voted down an amendment which would have expanded section 315(a) by requiring equal opportunities for opposing "representatives of any political or legislative philosophy" as well as for opposing candidates.
>
> But the language of the Conference Report, and the debates which took place in both houses of Congress prior to the conference, do not seem to establish an intention to ratify the Fairness Doctrine in all of its applications. Moreover, the *Lar Daly* decision, which it was the purpose of this legislation to overrule, did not involve the Fairness Doctrine. Even with respect to political matters, the language actually settled upon by the conferees (i.e., the last sentence now appearing in Section 315(a)) may be read as no more than a statement of the sense of Congress. This was more apparent in the original "Proxmire Amendment" than in the final language adopted. Nevertheless, the conferees regarded this final language as no more than a "modification" of the original Proxmire Amendment.

Legislative History of the Fairness Doctrine: A Staff Study for the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 25-26 (Subcommittee Print, 1968) (emphasis supplied). See also Robinson, *op. cit. supra,* note 29, 52 Minn. L. Rev. at 134.

authority for the personal attack and political editorial regulations. The decisions establishing personal attack and political editorial rules were not handed down before 1962—three years after the amendment.[75] The regulations were not issued until 1967—eight years after the amendment. Consequently, when it amended Section 315, Congress could not possibly have approved the personal attack and political editorial regulations.

Authority to issue the regulations cannot be extrapolated from any approval of the fairness doctrine because the regulations flatly contradict the very limitations on which the Commission's representatives laid the most stress in describing the fairness doctrine to Congress.

First, FCC Commissioner Ford explained in his testimony on the 1959 amendment that under the fairness doctrine the broadcaster had "full and complete authority" to make any programming determinations he saw fit "subject only to later review of his whole operation." *Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602 and H.R. 7985 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 101* (1959). The challenged regulations, on the other hand, impose automatic liability to grant free time for reply to every personal criticism of a public figure and every editorial supporting a political candidate regardless of any other consideration. The obligation arises in every instance without regard to the overall fairness of either the individual program or the broadcaster's "whole operation."

Second, the Commission explained to Congress in 1959 (*Hearings on H.R. 5389 et al., supra,* at 10):

> When it comes to application of the overall fairness standard a licensee can exercise discretion as to which viewpoints are entitled to be expressed and which spokesmen are entitled to be heard, with the exception

[75] Cases cited note 5, above; Public Notice, 25 P & F Radio Reg. 1899 (1963).

of permitting use of a station by legally qualified candidates for public office.[76]

The challenged regulations, on the other hand, leave no such room for the exercise of journalistic discretion.

The overriding importance attached by the Commission to these two limitations, coupled with the other differences between the fairness doctrine and the challenged regulations, is convincing evidence that the present regulations are outside the scope of anything Congress may have impliedly authorized by its reference to the fairness doctrine in the 1959 amendment.

D. Stated with detachment the arguments concerning the implications of the 1959 amendment may result in a standoff. On the one side, there is legislative history showing that some influential Senators were enthusiastic supporters of the fairness doctrine (see Petitioners' Br. 19-22). On the other, there are contrary indications of an intent not to give broader authority to the Commission.[77] With

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[76] See *Hearings on S. 1585, S. 1604, S. 1858, and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 71, 80 (1959); *Hearings on H. R. 5389, H. R. 5675, H. R. 6326, H. R. 7122, H. R. 7180, H. R. 7206, H. R. 7602 and H. R. 7985 Before a a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 96-101 (1959).

[77] The history of the bills discussed above is the best evidence of Congressional intent. Further, in 1963, Representative Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce and principal House manager of the 1959 amendments to Section 315, criticized the Commission's expansion of the fairness doctrine as "giv[ing] to the public interest standard of the Communications Act an interpretation which is contrary to the basic pattern of the Act." He warned:

> If the Commission in an attempt to achieve fairness seeks to apply its fairness doctrine to the content of individual programs involving the discussion of issues of public importance

respect to the challenged regulations, the Government can fairly say that they are derivatives from the fairness doctrine. On the other hand, the regulations are markedly more inhibitory and override important limitations emphasized by the Commission in explaining the doctrine to the Congress. Stated most favorably to the Government, therefore, the claimed authority to issue the challenged regulations appears only if uncertainties are resolved in favor of the claim, and even then, the authority can be found only by implication.

Under these circumstances the claim of administrative authority must be rejected. The regulations inhibit the liberty of the press. This Court has consistently adhered to the principle that only "the most explicit" authorization will support agency action in an "area of questionable constitutionality." *Greene* v. *McElroy*, 360 U.S. 474, 506-08; *Kent* v. *Dulles*, 357 U.S. 116, 129-30; *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *Ex parte Endo*, 323 U.S. 283, 299-300. Authorization by Congress in such cases "cannot be assumed by acquiescence or non-action." *Greene* v. *McElroy*, 360 U.S. at 507. Where constitutional rights are at stake, courts "will construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles*, 357 U.S. at 129.

That principle controls the present case. Nothing in the Communications Act can be read as "the most explicit" authorization for regulations inhibiting criticism of public figures and editorial support of or opposition to political candidates by conferring a right of reply. On the contrary, proposals to impose such obligations were thrice rejected.

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then, contrary to the policy of the Act, the Commission inevitably will inject itself into programming on a day-to-day basis.

Mr. Harris also feared that Commission scrutiny of individual programs would "lead to a blue-penciling by broadcasters of all programs containing reference to public issues. . . ." Address by Oren Harris before the Arkansas Broadcasters Ass'n (quoting Harris letter to FCC Chairman E. William Henry), reprinted in 109 Cong. Rec. 16571 (1963).

The argument under Section 315 shows no more than "acquiescence," and not even acquiescence in the power now asserted.

The reason for the rule is also applicable. Before the Court sustains an administrative restriction of personal liberty, especially freedom of expression, it should have assurance that the legislature, as the policy-making branch of government, has faced up to the conflict between freedom and the alleged need for regulation. Otherwise, "decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy*, 360 U.S. at 507. *Cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08. See also *Watkins* v. *United States*, 354 U.S. 178, 205-06, where the Court emphasized the need for such a legislative determination in the parallel case of inquiry by a subordinate investigating committee.

The personal attack and political editorial regulations evolved solely from gradually increasing administrative intrusion upon journalistic discretion. Congress, when the question was presented in legislative form, refused to impose upon broadcasters obligations essentially similar to those which the Commission has created. Even the alleged approval of the fairness doctrine in 1959 rests wholly upon indirection. To sustain the challenged regulations in the face of Congress' earlier rejection of essentially similar proposals, solely on the basis of broad phrases like "public interest, convenience and necessity," would, we submit, permit an administrative erosion of freedom of the press without any legislative determination of whether the costs of the sacrifice of a traditional freedom are justified by the need for regulation.

III

THE REGULATIONS ARE INVALID FOR LACK OF SPECIFIC FINDINGS UPON WHETHER ACCESS TO FULL AND FAIR DEBATE WOULD BE DENIED THE PUBLIC UNDER A REGIME OF FREE BROADCAST EXPRESSION

The substantial inhibitions which the challenged regulations put upon freedom of broadcast expression can be justified, if at all, only by a convincing showing that regulating the individual "fairness" of the public affairs programs of each licensee is the only practical way of securing public access to a wide variety of information and opinion. See pp. 38-52 above.

Whether enough broadcasting frequencies are available to provide opportunity for full multiplicity and diversity of opinion under a regime of individual freedom of expression is initially a question of fact, dependent partly upon physical laws and partly upon the current state of the technology. The number of broadcasting facilities has greatly increased during the years since early judicial and administrative rulings.[78] Once the facts were established, one would have to appraise the likelihood that the available opportunities were sufficient to produce the broadcast of a wide diversity of opinion even though each broadcaster was accorded freedom to exercise his own journalistic judgment. And, before the regulations imposing a standard of fairness upon each individual licensee could be approved, it would also be necessary to examine whether requiring each particular station to carry a later reply to a controversial program—or to give the subject of criticism time to respond—offers any real likelihood of reaching the same people who heard the original broadcast. Radio listeners seem to come and go, and shift from station to station. They have access to other mass media of communications.

Except for a few loose characterizations quoted from earlier opinions, the Commission has never explicitly addressed itself to these critical issues. It has not examined

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[78] See pp. 45-86.

the supposed scarcity of channels, analyzed the diversity or uniformity of views expressed or discussed the effect of access to other media. Clearly, it has failed to make any finding of such urgent necessity as would justify departure from the basic policies of the First Amendment.

We believe that the challenged regulations are invalid upon any set of facts that can reasonably be supposed to affect broadcasting generally. If the Court is not persuaded of that point, the failure of the Commission to face the critical question of necessity in the only terms that could provide constitutional justification is still enough to invalidate the regulations. For although it is settled that the courts will reach their own decisions as to both the extent of inhibitions upon speech and the alleged justifications, for purposes of determining the validity of a challenged regulation under the First Amendment, in this case the record does not contain even initial agency findings of the character or of the extent of need for regulation. The presumption of constitutionality will not supply the facts necessary to support the restriction of personal and political liberties. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4. Nor should the Court be asked to make assumptions or piece out the essential facts said to support a restriction upon freedom of the press where the agency charged with initial investigation has not made exact findings upon the critical issue. *Cf. United States* v. *Florida*, 282 U.S. 194; *Yonkers* v. *United States*, 320 U.S. 685. The cited cases hold that, where federal authority to control traditionally local aspects of transportation depends upon specific circumstances, the existence of those facts should appear affirmatively and not rest upon inference. "The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect . . . as by improper findings" (*id.* at 691). *A fortiori*, where the existence of the extraordinary power to regulate broadcast expression depends upon alleged circumstances requiring departure from the general guaranty of liberty of the

press, the facts supporting the Commission's claim of authority should be affirmatively disclosed upon a record of thorough investigation directed to the relevant questions.

This is no mere technical requirement. The available data indicate that, in the case of broadcasting, there is no necessity to abandon the basic postulate of the First Amendment. Possibly, a careful study would show the necessity. But liberty, even more than local interests, should not be sacrificed by casual assumptions or inattention to the facts. Insistence that the agency explicitly address itself to the precise issue is bottomed upon the same sound policy that precludes prosecution of speech under "a general and indefinite characterization" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 308) and prevents reading a delegation of authority to curtail First Amendment freedoms into legislation which does not grant it specifically (*Kent* v. *Dulles*, 357 U.S. 116, 129-30; *Greene* v. *McElroy*, 360 U.S. 474, 506-08). In each instance, the reason is that, before the judicial branch rules upon the constitutionality of the restriction, the body charged with policy-making should address itself precisely to the critical question. In the final analysis the Court will decide for itself whether an impelling legislative purpose justifies the curtailment of liberty, but the Court should not be asked to rule upon such a question before the facts concerning the need have been developed and weighed, within the proper constitutional framework, by the bodies having initial responsibility. *Cf. Watkins* v. *United States*, 354 U.S. 178, 205-06.[79]

In the instant case, the history of the Commission's pronouncements strongly suggests that it has never con-

[79] In the *Watkins* case the Court said: "Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need. . . . It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought. . . . The reason no court can make this critical judgment is that the House of Representatives itself has never made it."

sidered the question whether the current technology of broadcasting makes it impossible for the general public to receive full diversity of opinion through a multiplicity of uninhibited expressions. The *Report on Editorializing* assumes that, since freedom to broadcast may be restricted by the licensing necessary to prevent interference, the Commission may impose whatever inhibitions upon programming it finds to be in the public interest. 13 F.C.C. at 1257. From the sound premise that the public interest requires access to a variety of views upon public issues the Commission leaps to the unsound conclusion that every licensee should present the variety individually instead of exercising the journalistic judgment accorded to other members of the press. 13 F.C.C. at 1248, 1249. Upon the critical question whether the public would not be better informed by the spectrum of debate presented by a number of licensees each free to exercise its own journalistic discretion, the Commission said only that the absence of a duty of fairness "might conceivably result in serious abuse." 13 F.C.C. at 1254. Nothing in either the *Report* or any later opinion indicates that the Commission has ever examined either the facts bearing upon the scarcity argument or the effect upon the radio and television audience of other media of expression. That reliance upon freedom of the press to produce diverse, if one-sided individual expressions "might conceivably result in serious abuse," is not enough to justify disregard of the basic postulate of the First Amendment. The public is best informed by hearing from a variety of robust and uninhibited, even if violently partisan, sources of opinion.[80]

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[80] As a recent commentator stated, "If the right of the public to receive diverse and balanced viewpoints is the decisive desideratum, it is curious, to say the least, that the Commission purposely insists on ignoring the question of whether the public is in fact receiving diverse and balanced presentations from existing communications media as a whole." Robinson, *op. cit. supra*, note 29, 52 Minn. L. Rev. at 143.

The instant case, therefore, affords a dramatic example of gradual bureaucratic encroachment upon an essential liberty without either legislative or administrative confrontation of the critical issues. The language and legislative history of the Radio Act of 1927 and Communications Act of 1934 incontrovertibly demonstrate that Congress did not consciously determine to give the Commission power to require licensees to give a right of reply to political editorials and personal criticism of public figures. The strongest argument the Government can adduce is an inference of legislative approval for the fairness doctrine which it seeks to draw from the 1959 amendment. Section 315(a), as amended, 73 Stat. 557, 47 U.S.C. § 315(a). Thereafter, in 1962 and 1963, the Commission greatly increased the inhibitions in individual decisions and a press release formulating the personal attack and political editorial rules. In 1967 it added further sanctions, because of a desire to clarify procedure and secure stricter enforcement. But, just as there was never a clearcut legislative determination that the public interest required Congress to impose or authorize the imposition of these restrictions, so the Commission never squarely faced the critical questions of necessity in the only terms that would justify the inhibitions.

Now the Court is asked, first, to read the statute to embody an implied legislative decision to delegate to the Commission a power to impose legal obligations because of the ideas expressed in a broadcast upon public issues—a decision Congress never made expressly in either statutory language or debate—and, next, to presume that the Commission made factual determinations upon the critical issues concerning necessity which are neither expressed in findings nor canvassed in the opinions.

This Court's decisions stand squarely opposed to such erosion of liberty of expression. *Greene* v. *McElroy*, 360 U.S. 474, 506-08; *Watkins* v. *United States*, 354 U.S. 178, 205-06; cf. *United States* v. *Florida*, 282 U.S. 194; *Yonkers* v. *United States*, 320 U.S. 685, 691-92.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTES INVOLVED

Communications Act of 1934, as amended, 47 U.S.C.:

Section 3 (47 U.S.C. § 153):

* * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 4 (47 U.S.C. § 154):

* * * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

* * * * *

Section 303:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

Section 307:

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. * * *

* * * * *

Section 312:

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

Section 315:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the

foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 326:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 502:

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

Section 503:

* * * * *

(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

(C) fails to observe any final cease and desist order issued by the Commission,

(D) violates section 317(c) or section 509(a)(4) of this Act, or

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

* * * * *

(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability and in no event shall the forfeiture imposed for the acts or omissions set forth in any notice of apparent liability exceed $10,000.

APPENDIX B

REGULATIONS INVOLVED

FCC Rules and Regulations, §§ 73.123, 73.300, 73.598 and 73.679 (which read identically), 32 Fed. Reg. 10305-06, as amended at 11532 (1967) and 33 Fed. Reg. 5364 (1968).

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee.)

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The cate-

gories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

INDEX

PAGE

QUESTIONS PRESENTED 2

SUMMARY OF ARGUMENT 3

ARGUMENT 8

INTRODUCTION 8

I. THE RULES WOULD SUBSTANTIALLY INHIBIT THE BROADCAST OF VIEWS ON CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE IN VIOLATION OF THE FIRST AMENDMENT 9

A. Effective News Reporting Would Be Materially Burdened by the Rules 9

B. After Recognizing the Deterrent Effect of the Rules by Progressively Widening the Scope of the Exemptions, the Commission Effectively Recaptured the Exempted Programs by a New Requirement 18

C. Examples from Actual CBS Programs Illustrate the Probable Deterrent Effect of the Rules 22

1. News Commentary 23
2. News Interviews 28
3. News Documentaries 32
4. Newscasts 41
5. Other News-Related Programs 44

D. The Government Has Failed to Meet Respondents' Showing of Inhibition 45

II. BECAUSE THE GENERAL FAIRNESS DOCTRINE AND THE PERSONAL ATTACK RULES DIFFER CRITICALLY IN THEIR ORIGIN, OPERATION AND INHIBITORY EFFECT, THE VALIDITY OF THE FAIRNESS DOCTRINE NEED NOT BE DECIDED IN THIS CASE 54

PAGE

III. The Commission's Rules on Editorializing in Political Contests Are Violative of the First Amendment and the Communications Act 63

Conclusion 67

Appendix A 68

CITATIONS

Cases:

Abbott Laboratories v. *Gardner*, 387 U. S. 136 (1967) 54

Aptheker v. *Secretary of State*, 378 U. S. 500 (1964) 54

Ashton v. *Kentucky*, 384 U. S. 195 (1966) 53

Bantam Books, Inc. v. *Sullivan*, 372 U. S. 58 (1963) 46, 53, 54

Bay State Beacon, Inc. v. *FCC*, 84 U. S. App. D. C. 216, 171 F. 2d 826 (1948) 55

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) ... 27, 61

Columbia Broadcasting System, Inc. v. *United States*, 316 U. S. 407 (1942) 54

Cox v. *Louisiana*, 379 U. S. 536 (1965) 53

Curtis Publishing Co. v. *Butts*, 388 U. S. 130 (1967) 10

Daly v. *Columbia Broadcasting System, Inc.*, 309 F. 2d 83 (7th Cir. 1962) 10

Dombrowski v. *Pfister*, 380 U. S. 479 (1965) 46, 54

Freedman v. *Maryland*, 380 U. S. 51 (1965) 53, 54

Gelling v. *Texas*, 343 U. S. 960 (1952) 53

Henry v. *FCC*, 112 U. S. App. D. C. 257, 302 F. 2d 191, *certiorari denied*, 371 U. S. 821 (1962) ... 55

Jacobellis v. *Ohio*, 378 U. S. 184 (1964) 49-50

PAGE

Johnston Broadcasting Co. v. *FCC*, 85 U. S. App. D. C. 40, 175 F. 2d 351 (1949) 55

Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495 (1952) 11

Keyishian v. *Board of Regents*, 385 U. S. 589 (1967) 62

Kunz v. *New York*, 340 U. S. 290 (1951) 53

Lovell v. *Griffin*, 303 U. S. 444 (1938) 11

Mamiye Bros. v. *Barber S.S. Lines, Inc.*, 241 F. Supp. 99 (S. D. N. Y. 1965), *affirmed*, 360 F. 2d 774 (2d Cir.), *certiorari denied*, 385 U. S. 835 (1966) 48

Manual Enterprises, Inc. v. *Day*, 370 U. S. 478 (1962) 49

McCarthy v. *FCC*, 129 U. S. App. D. C. 56, 390 F. 2d 471 (1968) 30

Mills v. *Alabama*, 384 U. S. 214 (1966) 66

NAACP v. *Button*, 371 U. S. 415 (1963) ..27, 46, 54, 62

National Broadcasting Co. v. *United States*, 319 U. S. 190 (1943) 8,55

New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) 10, 12, 27, 49-50

Red Lion Broadcasting Co. v. *FCC*, 127 U. S. App. D. C. 129, 381 F. 2d 908, *certiorari granted*, 389 U. S. 968 (1967) 27

Saia v. *New York*, 334 U. S. 558 (1948) 53

St. Amant v. *Thompson*, 390 U. S. 727 (1968) 10

Schneider v. *State*, 308 U. S. 147 (1939) 53

Scripps-Howard Radio v. *FCC*, 316 U. S. 4 (1942) 10

Shelton v. *Tucker*, 364 U. S. 479 (1960) 62

Sherbert v. *Verner*, 374 U. S. 398 (1963) 62

Shuttlesworth v. *Birmingham*, 37 U. S. L. Week 4203 (Mar. 11, 1969) 53, 54

Smith v. *California*, 361 U. S. 147 (1959) 46

Speiser v. *Randall*, 357 U. S. 513 (1958) 61-62

Terminiello v. *Chicago*, 337 U. S. 1 (1949) 27

Thornhill v. *Alabama*, 310 U. S. 88 (1940) 54

PAGE

United Public Workers v. *Mitchell*, 330 U. S. 75 (1947) 62

United States v. *Dubrow*, 201 F. Supp. 101 (D. Mass. 1962) 40

United States v. *Louisiana*, 363 U. S. 1 (1960) ... 48

United States v. *Robel*, 389 U. S. 258 (1967) 62

United States v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956) 54

Watkins v. *United States*, 354 U. S. 178 (1957) ... 50

Zwickler v. *Koota*, 389 U. S. 241 (1967) 54

ADMINISTRATIVE DECISIONS AND REPORTS:

Anti-Defamation League of B'nai B'rith, 6 F. C. C. 2d 385 (1967), *affirmed, Anti-Defamation League B'nai B'rith* v. *FCC*, 403 F. 2d 169 (D. C. Cir. 1968), *petition for certiorari docketed*, Jan. 29, 1969, 37 U. S. L. Week 3285 58-59

Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416, 2 Pike & Fischer, R. R. 2d 1901 (1964) 52-53, 58

Billings Broadcasting Co., 23 Pike & Fischer, R. R. 951 (1962) 40, 56

Capital Broadcasting Co., 8 F. C. C. 2d 975 (1967) 24, 47, 58

Clayton W. Mapoles, 23 Pike & Fischer, R. R. 586 (1962) 56

Complaint of Clarance F. Massart (F. C. C., September 14, 1967) 16

Complaint of George E. Cooley (F. C. C. October 27, 1967) 16

Cullman Broadcasting Co., 25 Pike & Fischer, R. R. 895 (1963) 59

Cumberland Publishing Co., 13 F. C. C. 2d 897 (1968) 15, 48

FCC Public Notice-B, No. 8519 (Nov. 2, 1967) ... 16

PAGE

Garrett Broadcasting, Inc., 1 F. C. C. 2d 929 (1965) 16
Golden West Broadcasters, 10 Pike & Fischer, R. R. 2d 523 (1967) 58
Great Lakes Broadcasting Co., 3 F. R. C. Annual Rep. 32 (1929), *reversed on other grounds*, 59 App. D. C. 197, 37 F. 2d 993, *certiorari dismissed*, 281 U. S. 706 (1930) 55
Honorable John F. Thompson, 23 Pike & Fischer, R. R. 955 (1962) 42, 58
Lar Daly, 19 Pike & Fischer, R. R. 1103 (1960), *affirmed*, 286 F. 2d 146 (7th Cir.), *certiorari denied*, 368 U. S. 831 (1961) 57, 59
Letter to Carl Braden, January 21, 1964 (F. C. C. 8424) 52
Letter to CBS, 3 Pike & Fischer, R. R. 2d 623 (1964) 44
Letter to James A. Dombrowski, October 21, 1963 (F. C. C. 8424) 15, 52
Letter to KGEE, September 11, 1967 16
Letter to KING Broadcasting Co., 11 Pike & Fischer, R.R. 2d 628 (1967) 16
Letter to Oren Harris, 3 Pike & Fischer, R. R. 2d 163 (1963) 59
Pacifica Foundation, 36 F. C. C. 147 (1964)..... 41
Public Notice of July 25, 1963, 25 Pike & Fischer, R. R. 1899 56
Radio Albany, Inc., 4 Pike & Fischer, R. R. 2d 277 (1965) 47
Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949) 55, 56, 58, 59
Springfield Broadcasting Corp., 10 F. C. C. 2d 328 (1967) 16, 21, 48
Storer Broadcasting Co., 11 F. C. C. 2d 678, *affirmed*, 12 F. C. C. 2d 601 (1968) 55-56
Times-Mirror Broadcasting Co., 24 Pike & Fischer, R. R. 404 (1962) 56, 65
University of Houston, 11 F. C. C. 2d 790 (1968) .38, 48

PAGE

UNITED STATES CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS:

First Amendment ..... *passim*
47 U. S. C.
Sec. 315 ..... *passim*
Sec. 402a 54
81 Stat. 365 64
74 Stat. 554 64
73 Stat. 557 55
44 Stat. 1162 64

LEGISLATIVE MATERIALS:

106 Cong. Rec. 17035-41 (1960) 44
106 Cong. Rec. 14472-77 (1960) 44
105 Cong. Rec. 17781 (1959) 65
105 Cong. Rec. 16245-46 (1959) 64
105 Cong. Rec. 16231 (1959) 57, 65
105 Cong. Rec. 16227 (1959) 57
105 Cong. Rec. 14457 (1959) 57
105 Cong. Rec. 14453 (1959) 44
Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess. (1963) .. 57
Hearings before the Senate Subcommittee on Communications of the Committee on Commerce on S. 251, S. 252, S. 1696, H. J. Res. 247, 88th Cong., 1st Sess. (1963) 56-57
H. R. 5415, 89th Cong., 1st Sess. (1965) 57
H. R. 7612, 88th Cong., 1st Sess. (1963) 57
H. R. 11851, 87th Cong., 2d Sess. (1962) 57
H. R. 1735, 73rd Cong., 1st Sess. (1933) 64

PAGE

H. R. 7716, 72nd Cong., 1st Sess. (1931) 64
H. R. Rep. No. 1069, 86th Cong., 1st Sess. (1959) 30, 33
H. R. Rep. No. 1918, 73rd Cong., 2d Sess. (1934) 64
S. Rep. No. 1539, 86th Cong., 2d Sess. (1960) 44
S. Rep. No. 781, 72d Cong., 2d Sess. (1934) 64
S. J. Res. 207, 86th Cong., 2d Sess. (1960) 44

MISCELLANEOUS:

Brief for Appellant United States of America, *United States* v. *F C C*, *No.* 21147, D. C. Cir., *appeal dismissed*, January 23, 1968 53

BAKAL, THE RIGHT TO BEAR ARMS (1966) 36

CAHILL, *"Fairness" and the FCC*, 21 FED. COMM. B. J. 17 (1967) 59

Roper Research Associates, Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967 (April 5, 1967) 8

SEVAREID, IN ONE EAR (1952) 24

SEVAREID, SMALL SOUNDS IN THE NIGHT (1956) 24

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966 ed.) 47

WOOD, ELECTRONIC JOURNALISM (1967) 34-35, 68-71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT COLUMBIA BROADCASTING SYSTEM, INC.

In most respects, respondent Columbia Broadcasting System, Inc. ("CBS") agrees with and adopts the brief submitted by respondent Radio Television News Directors Association *et al.* ("RTNDA"), insofar as it challenges the constitutional and statutory authority of the Federal Communications Commission (the "Commission") to issue the personal attack and political editorial rules. CBS submits this separate brief for two purposes:

(a) To demonstrate by specific examples from CBS news-related programs that the rules, if upheld,[1] would

[1]As discussed *infra*, pp. 12-13, CBS has not to date abided by the personal attack rules because of its belief that they are unconstitutional.

deter the broadcast of views on controversial issues of public importance, and that this chilling effect would defeat rather than serve the public interest in being fully informed.

(b) To show that this case does not involve the constitutionality of the Commission's general fairness doctrine, and that the issues raised by the general fairness doctrine differ distinctively from those presented by the personal attack rules.

To comply with the briefing rules of this Court and at the same time avoid duplicative material, CBS adopts the following sections of the brief submitted on behalf of RTNDA: Opinions Below, Jurisdiction, Statutes and Regulations Involved, and Statement.

QUESTIONS PRESENTED

1. Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station—during the presentation of views on a controversial issue of public importance—broadcasts an "attack" upon the "honesty, character, integrity or like personal qualities" of any person or group, it must notify such person or group, furnish full information as to the "attack" and make available broadcast time to reply.

2. Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station broadcasts editorials supporting or opposing a political candidate, it must give notice, furnish a copy of the editorial and afford broadcast time to reply.

SUMMARY OF ARGUMENT

This case presents critical questions as to the power of the Federal Communications Commission to restrict the freedom of broadcast journalism—perhaps the most important First Amendment questions yet raised with respect to the broadcast medium of expression. The Commission has adopted categorical rules requiring that when, during presentation of views on a controversial issue of public importance on a broadcast station, an "attack" is made on the "honesty, character, integrity or like personal qualities" of any identified person or group, the station must notify the person or group attacked of the "date, time and identification of the broadcast," must furnish a script or tape of the broadcast (or an accurate summary if a script or tape is not available) and must offer a "reasonable opportunity" to respond over the station's facilities. Some types of programs are nominally exempted from the full sweep of the rules, but when an "attack" occurs in an "exempt" program, the station must ascertain and broadcast the views of the person or group attacked. A similar notification and reply time requirement is imposed in connection with station editorials supporting or opposing political candidates.

I.

The Commission agrees that broadcasters, like other publishers, are protected by the First Amendment, and has disclaimed any intention of deterring the broadcast of "personal attacks." The Government has conceded that "official action designed to prevent such attacks would not only exceed . . . [the Commission's] proper function but would also defeat the basic purpose of encouraging free speech." (Govt. Br. 61-62) Accordingly, the central question before this

Court is whether the rules do create a substantial likelihood of deterring the broadcast of statements falling within the Commission's definition of a "personal attack."

The personal attack rules will impose precisely such a deterrent effect upon CBS and the journalists who present some of its most highly regarded and informative public affairs broadcasts. The rules do not in terms forbid such programs, but, as Volume II of the record illustrates, the inhibitory effect of the rules would have an insidious, if not totally destructive, effect upon many of these programs and the public confidence now enjoyed by the journalists who present them.

The broadcast medium has several characteristics not shared by the printed press. These include the finite nature of broadcast time, the fact that any additional material broadcast necessarily displaces other material, the unpredictable content of unrehearsed interviews or discussions and the practical problems of network program scheduling and station clearance. For these reasons, the burdens imposed upon broadcasters by the personal attack rules are at least as severe as the burdens of the damage remedy for defamation which this Court has held unconstitutional as applied to nonmalicious statements concerning public figures.

Volume II of the record contains a large number of statements from Eric Sevareid's commentaries, *Face the Nation, CBS Reports* and other news documentaries. All of these statements are plainly or at least arguably "personal attacks" under the new rules. The practical burdens of arranging and clearing reply time (perhaps at different times from the original programs) on the 400-odd stations that make up the CBS radio and television networks are so onerous that they would often make it impractical for the journalists who present these programs to continue to

broadcast statements that fall plainly within the definition of personal attack or come close to the "danger zone."

The vagueness of the rules—the boundless limits of such terms as "attack," "character" and "like personal qualities," and the difficulty of identifying a "group" and its appropriate spokesman—will add to the pressure on broadcast journalists to forego making statements that may possibly come within the scope of the rules. The Government concedes that questions of interpretation will arise, and the Commission suggests that journalists can resolve them by consulting the Commission staff. But a journalist preparing a program would hardly have time to telephone someone at the Commission to learn whether a particular phrase falls within the rules, and in any event he could not get an authoritative answer in time to be relevant. As the Seventh Circuit held, the Commission's announced willingness to interpret the rules immediately before or after broadcast does not make them less objectionable; it makes them more so. This Court's decisions have long condemned the delegation to administrative agencies of vaguely defined discretion to influence the free exercise of First Amendment rights.

The Commission has recognized the deterrent effect of the rules by progressively widening the range of programs purportedly exempted. (The "exemptions" now include newscasts, regularly scheduled news interviews and commentary appearing within such programs). But in its latest order, the Commisison effectively recaptured the exempted programs by a new requirement. Unless the licensee obtains and broadcasts the views of the person or group attacked, the program loses its exemption from the rules. The burdens thus imposed as a consequence of broadcasting a personal attack in an "exempt" program are almost as onerous as those applicable to non-exempt programs and would have a comparable deterrent effect.

II.

Restraints on the free exercise of journalistic judgment can be justified, if at all, only by some public need of a magnitude that warrants curtailment of free speech, and then only if the restraints are reasonably adapted to meet that public need. The restraints imposed by the personal attack rules are particularly vulnerable because the public interest they are meant to serve can be and is being protected by the Commission's general fairness doctrine, which is far less inhibiting.

The Government devotes a major portion of its brief to defending the validity of the Commission's general fairness doctrine and to claiming that the new rules are merely a "facet" of that doctrine. But the general fairness doctrine and the personal attack rules differ critically in their origin, operation and inhibitory effect.

The general fairness doctrine has been Commission policy for over 40 years. It requires that over a period of time the licensee present both sides of any important public issue it chooses to cover in its programs. The personal attack rules seek to convert every "personal attack" occurring in these programs into an additional public issue which must be covered. They atomize the original issue being covered into many smaller issues, each of which sets off its own chain reaction requiring coverage of both sides.

The crucial difference between the general fairness doctrine and the new personal attack rules is that the former permits each station broad discretion to decide which of its broadcasts require balancing and to achieve balance in its own way. Under the general fairness doctrine, the broadcaster is not told whom to put on, what format to use, how much time to allow or what degree of control over subject matter he may exercise. The basic principles of general

fairness sought to be enforced by the doctrine comport with CBS's own standards of journalistic responsibility and have not significantly inhibited its journalistic freedom. Compliance with the particularized personal attack rules, on the other hand, would require CBS to make basic changes in the present content of its news-related programs.

For these reasons, as the Seventh Circuit held, the general fairness doctrine presents significantly different constitutional considerations from the personal attack rules that are here under review. The rules do not purport to codify the general fairness doctrine, and its validity ought not to be decided in this case.

III.

The political editorial rules violate the First Amendment and the Communications Act for the same reasons that the personal attack rules do. The editorial rules also interfere with the journalistic freedom of broadcast licensees in a manner that goes far beyond the fairness doctrine or any restraint on speech which might reasonably be thought to be in the public interest. And, since the editorial rules relate specifically to elections to political office, the rules enter upon a field that it was the purpose of Congress to preempt in Section 315 of the Act.

Congress has consistently refused to expand the narrowly drawn, specific equal time opportunity requirements for candidates into the very areas which are sought to be covered in the Commission's rules. The editorial rules not only intrude on the congressionally reserved area, but also introduce arbitrary and anomalous discriminations among opposing candidates.

ARGUMENT

INTRODUCTION

This is a landmark case in the history of American journalism. It has been more than a quarter of a century since this Court issued a major opinion considering the validity under the First Amendment of governmental restrictions on broadcast licensees. *National Broadcasting Co.* v. *United States,* 319 U. S. 190 (1943). During that period, broadcast journalism has become a major source of information for our entire population. Critical decisions of foreign and domestic policy, elections to the highest and lowest of public offices, are profoundly affected by what is seen and heard over the air.[2] The freedoms and responsibilities of broadcast journalists pose vital questions for the future of our society.

One of these vital questions has now reached this Court. It requires us to reexamine the reasons for our historic commitment to free expression and their continuing validity even in this electronic, complex and volatile age. But it also calls for surgical precision in identifying the particular dangers to free expression presented by the particular rules at issue here, measured against the particular public interest they are intended to serve, and against less burdensome means of achieving this objective.

The Government urges the Court to take the opposite course. It draws attention away from the precise impact of the particular rules on the treatment of controversial issues by broadcasters; it has chosen to depreciate or ignore

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[2]According to a survey published in 1967, the American public relies far more on the broadcast medium as a news source than on all other media combined. Roper Research Associates, Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967 (April 5, 1967), p. 7.

the many specific examples from actual broadcasts presented by CBS to the court below. It suggests instead that to reject the personal attack rules would be to reject the concept of regulatory power to require licensed broadcasters to operate in the public interest, and to challenge the validity of the Commission's general fairness doctrine.

In this brief, we seek in Part I to focus on the precise impact of the particular rules on CBS news-related programs, in Part II to demonstrate that the broader issues raised by the Government need not and should not be decided at this time, and in Part III to demonstrate the invalidity of the political editorial rules.

I. THE RULES WOULD SUBSTANTIALLY INHIBIT THE BROADCAST OF VIEWS ON CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE IN VIOLATION OF THE FIRST AMENDMENT.

A. Effective News Reporting Would Be Materially Burdened by the Rules.

The personal attack rules impose substantial restraints because their requirements conflict with the standards of good journalism. Good journalists often find it newsworthy and important to broadcast a statement that constitutes a "personal attack" under the rules, even though a prompt reply would neither be newsworthy nor feasible.

When an important and controversial public issue is being reported, inclusion of an attack upon a person's "honesty, character, integrity or like personal qualities" is not an unnecessary injection of personalities. Reports and analyses by journalists of personal attacks concerning these qualities of men in the public eye should not be thought of as aberrational but rather as directly in the public interest. The publication of personal attacks is

often important. It may be of critical importance when, as has happened on occasion during the history of this nation, publication occurs in an atmosphere of official suppression or private fear that has inhibited some media of expression. For this very reason—because of the inhibitory effect on the vigor of comment on public events—this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), barred libel actions based on false but non-malicious attacks on public figures. See RTNDA Br., pp. 28-29.[3]

When it first adopted the personal attack rules, the Commission appeared to doubt whether the public interest is served by reports of personal attacks; it stated that the restraints of the rules would apply only when a broadcaster "chooses" to make a personal attack, implying that the Commission would deem the public interest equally well served if the public heard neither the attack nor the reply.[4] While the Commission's latest memorandum opinion and order and the Government's brief refer to the Commission's

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[3]The broadcast press is of course fully subject to the laws of libel, to the same extent as newspapers. Under the rule of *New York Times Co.* v. *Sullivan, supra*, broadcasters remain legally responsible in damages for any libelous comment about private persons and any maliciously libelous comment about public figures. See *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). The news rules, however, impose an additional private administrative remedy for defamatory comment about public figures or private persons, even when it is true, and (contrary to *New York Times*) even when, if untrue, it is made in good faith.

The Commission, however, has no statutory power to create a merely private remedy for broadcast defamation. *Cf. Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 14 (1942). See also *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F. 2d 83, 85 (7th Cir. 1962) (no private remedy for damages for failure to give candidate equal time).

[4]July 5, 1967, Memorandum Opinion and Order, ¶5, A. 212a. "A. " references are to the record appendix containing the court of appeals' certified record.

policy of encouraging robust debate,[5] it is not clear that the inclination to discourage personal attacks has been entirely abandoned. The Government's brief in this Court, for example, refers to the Commission's judgment that "the broadcasting of personal attacks presents a serious problem requiring some kind of regulatory remedy." (Govt. Br. 75-76)

But whatever the underlying motive, neither the Commission in its final memorandum opinion and order nor the Government in its brief now claims any Commission power to inhibit the broadcast of personal attacks. The Commission's amendments to the rules in the course of this proceeding purported to remove any possibility of inhibition. See *infra,* pp. 18-19. In the Seventh Circuit the Government conceded that if the "rules were shown to have a seriously adverse effect upon the workings of a free press or the free expression of views, it might be said that they go beyond" the Commission's power. (Govt. Br. below 48) And the Government now asserts that the Commission "has long recognized that official action designed to prevent such [personal] attacks would not only exceed its proper function but would also defeat the basic purpose of encouraging free speech." (Govt. Br. 61-62)

These Government concessions are well advised. While broadcasting, like the motion picture, is not "necessarily subject to the precise rules governing any other particular method of expression," *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503 (1952), the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[6] *Ibid.* One of the basic tenets of the First Amendment is that free, open and robust debate on

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[5]March 27, 1968, Memorandum Opinion and Order, ¶3, A. 229a; Govt. Br. 38, 75.

[6]"The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1938).

public matters must not be inhibited. As this Court said in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The Commission itself has recognized that "[t]he issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees." (A. 229a) Apparently, therefore, the only point of difference between the Government and CBS is whether the Commission's rules, as last revised, do substantially inhibit speech by deterring the broadcast of statements that plainly or arguably fall within the definition of personal attack.

The Seventh Circuit found the Government's treatment of this question to be wholly inadequate. It noted: "[n]either the Commission's three memorandum opinions nor its brief . . . [in the court of appeals] are altogether responsive" to respondents' contentions as to probable inhibition. (A. 355a) The court concluded:

> "Despite the Commission's disclaimers to the contrary, we agree . . . that the rules pose a substantial likehood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance." (A. 357a)

We submit that the Seventh Circuit was clearly correct. At present CBS journalists are free to report and interpret the news as they see it, subject only to the high standards of journalistic objectivity and integrity that they

and the CBS News Division maintain.[7] Since they adhere to these standards, they presently need have no serious concern that their broadcasts may subject them or CBS to a damage judgment or any other form of punishment or sanction.

The men who gather the news and prepare and edit these broadcasts have above-average endowments of skill,

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[7]An October 23, 1967, memorandum from Mr. Leon Brooks, late CBS Vice President and General Counsel, to Mr. Richard Salant, President of the CBS News Division, outlines the policy being followed by CBS pending adjudication of this case:

> "Meanwhile the question arises as to how the CBS News Division should conduct itself while our substantial constitutional and statutory claims are being considered by the courts. After careful study of the matter, the Law Department recommends that the CBS News Division not change its policies and procedures pending resolution of the issues in the present judicial proceedings. We believe the disruption of schedules required to accommodate replies to the numerous broadcast statements that may reflect upon the 'honesty, character, integrity or like personal qualities' of an individual or group might be such as to induce CBS newsmen and editorial personnel to avoid such statements even when they may be highly newsworthy and critical to a public understanding of the issues involved. CBS newsmen and editorial personnel should not be placed under such restrictions unless and until they are finally and irrevocably required by law.
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> "Pending the outcome of the litigation concerning the new rules, you should continue your past policy of fairly treating all sides of controversial public issues. CBS newsmen should continue to exercise their own conscientious news judgment, and, where they believe appropriate in the interest of fairness, to continue to interview various parties to a controversy before broadcast or to solicit the appearance of responsible spokesmen of opposing points of view. However the news staff should not, as the new rules would apparently require, routinely notify and grant reply rights to all individuals or groups whose 'honesty, character, integrity or like personal qualities' are referred to on our public affairs programs.
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> "We believe that present news policies and procedures should be continued until the validity of the new rules is adjudicated. This course of action is not without legal risk, but it is believed that CBS is justified in assuming those risks to maintain its journalistic standards."

intelligence and wit. But these attributes alone do not fully explain the value of the broadcasts. The quintessential added ingredient is the freedom these journalists possess. The manner in which they exercise that freedom is what gains or loses them the public trust. And the public trust these particular broadcasts enjoy is based on the public confidence that the men who prepare them will probe for the truth and report events as they see them.

If the personal attack rules are upheld, however, these journalists must then have a very serious concern about what they broadcast. When a CBS newsman covers his subject and chooses the significant material to report, he will have to bear in mind the Commission's admonition that "where he chooses to make such presentations [statements defined as personal attacks]" the stations carrying his commentary "must take appropriate notification steps and make an offer for reasonable opportunity for response. . . ." (July 5, 1967, Memorandum Opinion and Order, ¶ 5, A. 212a). Failure to do so is punishable by cease and desist orders, loss of license, forfeitures and criminal penalties.

The journalists must also bear in mind the practical problems presented by the nature of the broadcast medium and the impact of the rules' requirements. Among these problems are the following:

1. Unlike a newspaper, which has few practical limitations on the number of pages and columns that it can publish, a broadcast station is sharply limited by the finite nature of broadcast time. As the Government necessarily recognizes (Govt. Br. 46), there are a limited number of hours in the broadcast day. Any broadcast material presented forecloses the broadcast of other program material. This means that the broadcast of replies necessarily requires the broadcaster to delete other pro-

gram material which in his judgment is of greater interest to the public.

2. The rules apply to all personal attacks, whether made or reported by a CBS journalist or by a person in the news who appears on the program. They apply whether the "attack" is true or false. They apply whether the substance of the attack is itself an issue of public importance or whether it arises incidentally in the course of discussing such an issue.[8] And, as the Seventh Circuit found (A. 362a-363a), the vague terms of the Commission's rules add materially to the burden they impose. The Government itself concedes (Govt. Br. 71-72) that the definition of "personal attack" (an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group") is so expansive that it is "subject to diverse interpretations and applications."[9]

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[8]For example, the Commission has ruled that a news account of an arrest for subversive activities, containing a statement that the home of the arrested couple was littered, entitles the couple to "deny the disorderly characterization of their home and claim that the arresting officers themselves improperly littered it." *Cumberland Publishing Co.*, 13 F. C. C. 2d 897 (1968).

See also *Letter to KGEE*, September 11, 1967, where the Commission ruled that a personal attack had occurred during the discussion of a controversial issue of public importance. Although controversial public issues had been discussed earlier in the program, the issue under discussion at the time of the attack was the right of a listener to call the station and have her views broadcast. This issue had arisen because of a dispute between the station's moderator and the listener.

[9]The Government suggests that licensees are capable of making reasoned judgments as to the meaning of the rules, even though "in a given instance, reasonable men may . . . differ as to whether an attack covered by the rule has occurred." (Govt. Br. 73) But whatever the ability of lawyers to determine precisely what is covered by the rules, the critical point is that the rules must be interpreted by journalists who must do so shortly before they go on the air or while they are on the air.

3. The rules require more than "equal time." Indeed, they may require far more than equal time for the person or group presenting a reply. On at least one occasion the Commission has explicitly ruled that the licensee is required to give more time for the reply than for the original attack.[10]

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[10] *Garrett Broadcasting, Inc.*, 1 F. C. C. 2d 929-30 (1965) ("Thus in a particular case involving a personal attack of a few seconds duration, fairness may require that an amount of time appropriate to make a sufficient answer be afforded, rather than precisely the same few seconds.") See also *Springfield Broadcasting Corp.*, 10 F. C. C. 2d 328 (1967).

In connection with the political editorializing rules the Commission has noted (July 5, 1967, Memorandum Opinion and Order, ¶15, A. 219a):

> "The phrase 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

See also *Complaint of Clarence F. Massart* (FCC, Sept. 14, 1967); *Complaint of George E. Cooley* (FCC, Oct. 27, 1967), where unendorsed candidates complained to the Commission that King Broadcasting Co. had not offered reasonable opportunity to respond to the station's editorial endorsements of candidates in the primary and general elections, respectively, for the Seattle City Council. In the primary, King had offered each of the 23 unendorsed candidates two one-minute replies to answer a total of 10 minutes of editorials. The Commission ruled that this was not sufficient and that King had made no showing that the replies would be carried in periods of comparable audience potential, or broadcast with comparable frequency. A settlement was negotiated under which the complaining candidate was allowed six 20-second replies. In the general election, although King offered a total of six 20-second replies to each of the four unendorsed candidates, the Commission again ruled that this was not sufficient because it had not been shown that a greater number of responses could not be afforded such as twelve 10-second announcements "oft-times used in political campaigns." The Commission stated that the frequency of response was to be separately negotiated with each candidate. FCC Public Notice-B, No. 8519, at 2 (Nov. 2, 1967). Thereafter it was agreed that the complaining candidate would be allowed an additional 20-second response during prime time on election eve. See *Letter to KING Broadcasting Co.*, 11 Pike & Fischer, R. R. 2d 628 (1967).

4. Where a network broadcast is involved, each affiliate carrying the original broadcast is individually obligated to carry the reply.[11] There may be substantial practical problems in scheduling the reply for broadcast over the same stations that carried the original attack. Network lineups vary substantially from program series to program series.[12] For example, in 30 of the top markets in the United States the clearance for CBS broadcast series during a selected week in September 1968 varied from a high of 30 stations clearing to a low of 16 stations clearing. Considering all CBS affiliates the problems are even more formidable, and clearance during the same selected week varied from a high of 192 stations, the full lineup, to a low of 122 stations.

Because of these practical broadcasting problems, every time an offending statement is made in a CBS news or public affairs program a burdensome sequence of events will be set in motion. The CBS News Division will have to decide whether the statement is subject to the personal attack rules and may have to consult with the CBS Law Department. If the decision is that the rules apply, the person or group attacked must be identified, located, given a tape, script or summary of the attack, and offered time to reply.

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[11] As the Commission stated in its July 5, 1967, Memorandum Opinion and Order, ¶ 8, A. 214a:

> "Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied."

[12] The problem posed by the rules is thus particularly acute in so-called "specials," *i.e.*, once-only broadcasts which are not part of a series. Replies to personal attacks occurring in these programs must necessarily be broadcast in another program series or in another special for which clearance may be significantly different.

The offer is likely to involve protracted negotiations as to the amount of time to be afforded, the format of the broadcast, limitations on subject matter, and a variety of other questions. Either CBS or the person or group affected may refer one or more of these questions to the Commission; and extended pleadings, conferences and delays may result.

Under the Commission's rules, the number and length of the replies that must legally be invited if "personal attacks" are broadcast, and the many difficult practical problems involved in arranging and clearing the necessary time, are so burdensome that CBS and other broadcasters will as a practical matter find it necessary to regard the reply requirement like the threat of damages for libel—a risk to be avoided even at the cost of abstaining from publishing statements that engender the oppressive sanction. Thus, the rules will adversely affect the quality of news and news-related broadcasts and make participation in them less attractive to the best journalists.

B. After Recognizing the Deterrent Effect of the Rules by Progressively Widening the Scope of the Exemptions, the Commission Effectively Recaptured the Exempted Programs by a New Requirement.

In the course of this rule making proceeding, the Commission itself has recognized the deterrent effect of a right of reply requirement. Even in its initial ruling, the Commission recognized that the rules would inhibit journalists who preferred not to present replies.[18] And before the appeals from the original rules could be heard, amendments were adopted, as the Government puts it, "upon further consideration, to insure that interference with broadcasters'

[18] July 5, 1967, Memorandum Opinion and Order, ¶ 9, A. 216a.

news functions is avoided, a concern of the Commission throughout." [14]

The Commission first amended the rules in August 1967. It exempted personal attacks occurring in "bona fide newscasts" and "on-the-spot coverage of bona fide news events." The announced reason for taking this action was that the presentation of such programs might be impeded if the rules were applicable to them. (A. 223a-224a)[15] The March 1968 amendments, prompted by a letter from Assistant Attorney General Turner to Chairman Hyde,[16] broadened the category of exemptions to include personal attacks occurring in some (but not all) types of interviews and commentary, again in order to reduce the possibility of inhibition.[17]

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[14]Govt. Br. 77.

[15]"To import the concept of notification within a week period, with the presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks." August 2, 1967, Memorandum Opinion and Order, ¶ 2, A. 223a-224a.

[16]The letter stated that the Department of Justice has "some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve." (A. 311a)

[17]The Commission's memorandum opinion and order begins by asserting that:

> "Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative." (A. 229a)

But the Commission also argues that its "action avoids *any* possibility of inhibition in these important areas of broadcast journalism . . ." (A. 230a), and that "[t]here is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (A. 232a) The Commission goes on to state that it is "exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects." (A. 233a). Finally, the Commission notes that:

> ". . . it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of in-

But what the Commission has purported to free, it has in fact recaptured. In the same March 1968 amendments, all "exemptions" are largely vitiated by a new special "fairness" requirement made expressly applicable to exempt programs. (A. 232a-233a)

The recapture is neatly accomplished by paragraph 5 of the Commission's March 27, 1968, Memorandum Opinion and Order. (A. 232a)[18] It states that the licensee's normal discretion to discharge his general fairness obligations in ways and at times of his own choosing does not apply to the broadcast of personal attacks. Whenever a licensee

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hibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here." (A. 234a n. 5)

[18]Paragraph 5 provides:

"5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc.* (WRAL), July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond." (A. 232a-233a)

broadcasts a personal attack on an exempt program, he may "choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue . . . ." (A. 232a) Presumably this means that he must obtain the views of the person attacked, and must present them, albeit he may do so through a spokesman of his own choosing.[19] But "if the licensee has not done so or made plans to do so," the specific personal attack rules apply. (A. 232a)

The Commission has thus elevated every personal attack on news-related programs dealing with controversial public issues to the level of a separate controversial public issue. The other side of that separate issue must be covered within a brief time frame by presenting "the viewpoint of the person or group attacked."[20] The licensee is deprived of the discretion allowed under the general fairness doctrine to determine whether the attack raises a controversial issue of public importance, whether balancing comment is needed, what views should be presented in opposition, and when they should be carried.

The paragraph 5 variant has narrowed the exemptions to the point where they have little, if any value. Virtually all personal attacks made in news-related programs are related to some underlying controversial public issue, as the Government conceded before the Seventh Circuit. (Govt. Br. below 49 n. 35)[21] Virtually all personal attacks, therefore, now require a response. For example, a newscast routinely reporting a criminal indictment of a public figure would require a prompt response fairly stating the accused's views on the charges. The same is true of a news report of a legis-

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[19]The statement or views must be complete, and the broadcast of a simple denial is not sufficient. *Cf. Springfield Broadcasting Corp.*, 10 F.C.C. 2d 328 (1967) (broadcast of denial under the circumstances held to constitute a personal attack).

[20]A. 232a.

[21]See also p. 15, *supra.*

lator's attack on another legislator, and of an attack on an official of the executive or judicial branch or a private citizen.

To be sure, paragraph 5 does not require licensees to permit personal appearances by those attacked on "exempt" programs; the journalist conducting such programs may "choose fairly to present" the response himself, with the Commission looking over his shoulder every time a complaint about the exercise of that choice is made. But even with such limited freedom of action, the new duty to present responses to every "personal attack" in "exempt" newscasts, on-the-spot coverage of bona fide news events, regularly scheduled news interviews and news commentaries will impose a substantial burden on those who prepare such programs. And if the licensee fails to satisfy this stringent new requirement, the full reach of the personal attack rules comes "into play." (A. 232a)

As the Seventh Circuit correctly concluded:

> "The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the 'attack issue' of the 'exempt' broadcast, the licensee must adhere to the explicit requirements of the rules." (A. 357a n.27)

C. Examples from Actual CBS Programs Illustrate the Probable Deterrent Effect of the Rules.

The burdens of the personal attack requirements on programs subject to the rules—and on programs nominally "exempted" from the rules—are illustrated by the way the requirements bear on some of the more highly regarded CBS programs. Most of the examples set forth below are

transcript excerpts contained in Volume II of the record in this Court.[22]

The excerpts are limited to CBS Television Network broadcasts; they do not include the many personal attacks appearing in separate broadcasts of the CBS Radio Network or in non-network broadcasts on the CBS owned radio and television stations. Even as to the CBS Television Network, the list of statements that are actual or debatable personal attacks is far from complete. Nevertheless, the list includes sufficient examples to prove beyond debate that (a) statements which are or may be "personal attacks," as defined in the Commission's rules, occur with substantial frequency in public affairs broadcasts, (b) their occurrence is essential to the journalistic integrity and public value of the broadcasts, and (c) the burdens of following the rules (or the paragraph 5 variant (see pp. 18-22 above)) are so great that many of the offending statements—if not entire broadcasts—would probably have to be eliminated.

1. News Commentary.

CBS broadcasts the Eric Sevareid commentaries in the course of the *CBS Evening News,* and it broadcasts other news commentaries not included in "exempt" programs.[23]

[22]The suggestion of the Government below that these examples are not part of the record is discussed below, pp. 48-50.

[23]CBS carries a substantial amount of news commentary outside of its newscasts and other exempt programs. Throughout the day the CBS Radio Network carries many news commentary programs. The following are examples: *First Line Report; Walter Cronkite Reporting; The Reasoner Report; News Analysis With Marvin Kalb.* Most CBS affiliates broadcast these programs outside their regular newscasts.

Moreover, many of the more informative and important news analysis programs on the CBS Television Network would remain subject to the rules, including "CBS News Correspondents Report, Part I, America and the World" (a year-end analytic report broadcast December 31, 1968), and "Part II, The Nation" (January 1, 1969). On January 14, 1969, following the broadcast of President Johnson's State of the Union message, CBS broadcast a 10-minute analysis of the President's speech.

The rules "exempt" the Sevareid commentaries (leaving them to the tender mercies of paragraph 5) but not the latter.

Mr. Sevareid's daily commentaries have achieved more than transient recognition. Collections of them have been published in book form,[24] and have received wide critical acclaim.[25] In the year ending October 12, 1967, CBS broadcast 134 of these commentaries. All were carried by the CBS Television Network; many were also carried by the CBS Radio Network. Volume II of the record contains the full text of 31 such commentaries containing statements that are at least arguably covered by the Commission's personal attack requirement. (A. II (E. 1) 2-43)[26] The 31 programs contained more than 50 "personal attacks" concerning identified individuals or groups. Some examples are listed below:

> "On the surface, at least, either the irresistible force, Mr. Kennedy, or the immovable object, Mr. Hoover, is telling less than the truth.[27] (A. II (E. 1) 5)
>
> There is a "popular notion that congressmen are natural crooks . . . ." (A. II (E. 1) 26)
>
> "Much of . . . [Lord Russell's writing] is the work of a tense, humorless young American expatriate named Ralph Schoenman, one of a small band of far left Americans, some of them committed Commu-

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[24] SEVAREID, SMALL SOUNDS IN THE NIGHT (1956); SEVAREID, IN ONE EAR (1952).

[25] Among the awards received by Eric Sevareid are ones from the *Saturday Review* (1965) and the Washington Press Corps (1962), as well as a Peabody Award (1964), which stated: "We respect the network for the latitude it has allowed Mr. Sevareid, and we admire him for the directness with which he engages his listeners and for the concise and penetrating way in which he goes to the heart of the more troublesome issues."

[26] Volume II of the record appendix contains the two CBS exhibits filed with the Seventh Circuit. "A. II (E. 1) " references are to the first CBS exhibit, filed with the Seventh Circuit on November 21, 1967. (A. 292a) "A. II (E. 2) " references are to the second CBS exhibit, filed April 17, 1968. (A. 343a)

[27] A comparable statement was held to constitute a personal attack in *Capitol Broadcasting Co.*, 8 F. C. C. 2d 975 (1967).

nists, who have operated in England for several years."[28] (A. II (E. 1) 28)

"The alleged misdeeds at issue [in the Dodd case] are in the realm of carelessness, but on a scale beyond normal proportions . . . . [T]he offense Mr. Dodd is charged with by the Ethics Committee is damage to the repute of the institution." (A. II (E. 1) 30)

"The remarkable young man known as Muhammed Ali or Cassius Clay had an unconvincing case for refusing military service, and apparently expected to be found guilty." (A. II (E. 1) 31)

". . . H. Rapspierre Brown teaches guillotine building in New York schools." (A. II (E. 1) 39)[29]

The average Sevareid commentary occupies approximately two minutes of broadcast time. Any meaningful reply or statement of views of the person or group involved would have to be at least one or two minutes in length. By broadcasting these 31 Sevareid commentaries in the course of a year, occupying some 62 broadcast minutes, CBS would have been required under the "paragraph 5" procedure promptly to ascertain and present the views of 50 identified individuals or groups. The amount of time that would have to be devoted to their replies would be substantially greater than the time required to broadcast the 31 "offending" commentaries.

This duty to present reply views would have applied to every person or group attacked even if in Mr. Sevareid's and CBS' best judgment no further discussion of the matter would have been newsworthy. Moreover, if any individual (or group) was dissatisfied with CBS' summary of his

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[28]The Commission has held that statements describing someone as a Communist are clearly personal attacks. See pp. 52-53, *infra*.

[29]During the same period, CBS had broadcast appearances by Mr. Hoover, Senator Kennedy, Senator Dodd, Muhammed Ali and H. Rap Brown. However, under the rules an additional appearance or statement in response to the attack would have been required.

views, he would be free to contend that the paragraph 5 procedure had not been met and to ask the Commission to direct CBS to comply in full with the personal appearance provision of the new rules. In confronting the "choice" of presenting replies or deleting the attacks, Mr. Sevareid as a practical matter would have to follow the latter course.

Even the dubious advantages of the paragraph 5 variant available for Eric Sevareid's commentaries on the *CBS Evening News* would be denied to the many commentaries broadcast by Walter Cronkite and others outside of newscasts. Although the Commission has conceded that "commentary or analysis is an integral and important part of the news process involved in the category 'bona fide newscast'," (A. 231a), it has never explained why this type of broadcast journalism is any less an "integral and imporant part of the news process" when it appears outside a "bona fide newscast." There is no rational basis for "exempting" the former and covering the latter. Commentary is commentary, whether included within a newscast or not so included. In either form commentary is often likely to contain what the Commission defines as personal attacks. Under the current version of the Commission's rules, the journalists who prepare such programs would be strongly impelled to delete the offending remarks from their commentaries.

Examination of the March 27, 1968, Memorandum Opinion and Order points to one possible explanation as to why the Commission created this patchwork of "exemption" and nonexemption. The Commission notes that in the case of "syndicated programming" it has found "some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks . . .," while "no similar pattern of abuses" has been found in newscasts, on-the-spot coverage of bona fide news events and news interviews. (A. 230a)

The memorandum opinion and order does not clarify what it means by "syndicated programming." Presumably, however, it refers to commentary programs that are distributed not by networks to their affiliates but by other program sources. A number of these syndicated commentary programs happen to feature commentators with "extreme" views, a typical example being Reverend Billy James Hargis, who broadcast the commentary at issue in *Red Lion Broadcasting Co.* v. *FCC*, 127 U. S. App. D. C. 129, 381 F. 2d 908, *certiorari granted*, 389 U. S. 968 (1967) (No. 2, this Term), Commissioner Loevinger's dissent suggests that one Commission purpose in covering news commentary outside of a newscast was to reach commentary of this nature while "exempting" commentary such as that of Eric Sevareid. (A. 245a-246a)[30]

If so, the Commission has twice missed the mark. First, as we have shown, the net it casts for "extreme" commentary happens to cover a good deal of the "responsible" commentary broadcast by the networks and by many "responsible" stations outside of newscasts. Second, a line drawn so as to free "responsible" comment while restricting "extreme" comment is patently repugnant to the First Amendment. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *NAACP* v. *Button*, 371 U. S. 415, 444-45 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296, 310 (1940).

We recognize that occasionally false and malicious personal attacks may be broadcast to a public which may never

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[30]On the other hand, Commissioner Cox disclaims any such discriminatory purpose on the part of the Commission (A. 258a-260a). While we accept this statement as made in entire good faith, we do not find in the Commission memorandum opinion and order, the separate statement of Commissioner Cox, or petitioners' brief any other rational explanation for the line the Commission decided to draw between news commentary which happens to be scheduled in the context of a newscast and news commentary which is contained in a separate program.

see or hear a reply. But the legal remedies for malicious defamation are available to deal with such cases. The vice of the additional measures now sought to be imposed by the Commission is that they so seriously inhibit free discussion as to be far worse than the malady they are designed to cure.

2. News Interviews.

CBS broadcasts two kinds of news interviews—regularly scheduled news interviews such as the *Face the Nation* series and non-regularly scheduled news interviews such as the Eric Hoffer interview discussed below. In all relevant respects these two kinds of interviews are indistinguishable. Under the Commission's rules, however, *Face the Nation* is nominally "exempt" (but still caught under the paragraph 5 variant) because it is regularly scheduled, while occasional news interviews, including some of equal or greater journalistic importance, are subject to the full impact of the rules.

Face the Nation interviews not only illuminate the news; they frequently make news as well. Fifty-eight of the 85 weekly *Face the Nation* programs broadcast from April 1966 to November 1967 resulted in news stories that appeared in the *New York Times* or the *Washington Post* or both, the following day. Nineteen of these programs resulted in front-page stories in the *Times* or the *Post* or both.

The inhibiting effect of the Commission's action on *Face the Nation* would significantly damage the integrity and purpose of that program. The central idea of *Face the Nation* and similar news interview programs is to question an important public figure about the important public issues in which he is currently involved. The essence of good interviewing is to ask provocative questions, questions

that relate not merely to abstract issues of public policy, but also to the "honesty, character, integrity or like personal qualities" of individuals of groups which figure in such public issues. The bite of the rules on news interviews is therefore especially sharp. The interviewers cannot judge whether the requirement will be brought into play solely by what they themselves may say; before saying it, they must also take into account the many possible answers their questions may produce.[31]

In a high proportion of *Face the Nation* programs, the interviewers ask questions that either contain a statement the Commission now defines as a personal attack or may result in a reply containing such a statement. Thirty-four of the programs from March 1966 to October 1967 contained 75 or more statements, collected in Volume II of the record (A. II (E. 1) 44-88) that at least arguably fall within the Commission's definition of personal attack.

To illustrate the problem, we invite the Court's attention to another *Face the Nation* interview with Mr. Adam Clayton Powell, Jr., carried on the CBS television and radio networks on Sunday, January 14, 1968, reprinted in Volume II of the record. (A. II (E. 2) 55-74) It contains numerous personal attacks by Mr. Powell on such varied individuals and groups as Senator Dodd, John Conyers, Claude Pepper, Edith Green, Judge Matthew Levy, the Harlem Police, and eleven members of Congress who introduced a resolution concerning Mr. Powell's office.

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[31]It is no answer to the journalist's problem to say (Govt. Br. 71 n. 37) that counsel for the Government now believe "many" of these statements (without specification) are not attacks. A journalist cannot function with counsel at his elbow. If the broadcast of "personal attacks" requires him constantly to subordinate his editorial judgment to the legal judgments of others, he will have a strong incentive to avoid such attacks. In the resulting atmosphere, it would be extraordinarily difficult for the broadcasting medium to provide a forum for robust debate, or indeed to continue to attract and retain journalistic talent of any quality.

It would have been journalistically impossible for the moderator of the interview to interrupt it on the occasion of each such attack to present the response of the person or group attacked or a statement of the views of such person or group. It would have taken another half-hour broadcast —and perhaps more—for CBS to compile and carry a subsequent collection of the views of those attacked. The necessarily disjointed nature of any such program would have sharply limited its quality and ability to interest the listening public. As a practical matter the only choice left to CBS under the Commission's latest refinement of the rules (including the paragraph 5 variant) would have been to give up the idea of an interview with Mr. Powell.

Non-regularly scheduled news interviews continue to be subject to the full personal reply requirement of the rules.[32] CBS broadcasts many such interviews that are of substantial public interest. As an example of a personal attack occurring in a non-regularly scheduled news interview, we presented in our brief to the court of appeals, and quote below, an incident occurring during the CBS news special "Eric Hoffer: The Passionate State of Mind," an interview or conversation between Eric Sevareid and Eric Hoffer, broadcast on September 19, 1967. The broadcast attracted wide public interest and was repeated over the CBS Television Network on a second occasion. In the course of the program, Mr. Hoffer expressed colorful and critical views about many leading personalities. The following exchange occurred with reference to Stokely Carmichael:

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[32]The rules defined the scope of the news interview exemption by reference to the 1959 amendments to Section 315 of the Communications Act, 47 U.S.C. § 315. Those amendments appear to exempt only news interviews in regularly scheduled program series (such as *Face the Nation*). See H. R. REP. No. 1069, 86th Cong., 1st Sess. (1959), p. 4, cited in the Commission's March 27, 1968, Memorandum Opinion and Order (A. 231a n. 3). See also *McCarthy v. FCC*, 121 U. S. App. D. C. 56, 390 F. 2d 471 (1968).

"SEVAREID: Well now, what about some of these new young Negro leaders, like Stokely Carmichael? They—they sound as though they're racist.

"HOFFER: Oh, they just sound. They just sound. There's nothing. They're all phonies.

"SEVAREID: But it's race hatred they're preaching.

"HOFFER: Yeah, but who—who's going to listen to them. Maybe a few—They—they are not going to get anywhere because they have this—these naive conceptions of power. They say: 'Power. Power. Give me power.' Nobody can give you power. Power doesn't come in cans. When I hear Carmichael, he's always asking: 'Give me the can opener so I'll open the cans of power and eat them,' see. And they're all phony, these people. They—they do not realize that it's the long-term projects, things that you go about patiently and quietly that will achieve results. Listen once you have realized that, see, you are not going to waste your energies on hatred. You are not going to waste your energies on anything except building."

This was plainly a personal attack on Stokely Carmichael. Although the interview was taped before broadcast, it would have been stultifying from a journalistic viewpoint to delete this portion of the conversation. It would have destroyed the mood of the program—a wide-ranging conversation between a journalist and a philosopher—to insert a reply by Mr. Carmichael, an opportunity he would doubtless have accepted with alacrity. And for reasons discussed elsewhere in this brief it would have been impracticable to schedule a reply by Mr. Carmichael at some later time. Yet,

under the personal attack rules, Mr. Sevareid and CBS would have had to make one of these choices.[33]

This year another conversation between Eric Sevareid and Eric Hoffer was broadcast on January 28, 1969. ("The Savage Heart—A Conversation with Eric Hoffer.") In the course of that broadcast, as in the earlier interview, Mr. Hoffer expressed critical views concerning leading personalities. He made statements constituting "personal attacks" on intellectuals as a group, and specifically on Arthur Schlesinger, Jr., Senator Eugene J. McCarthy, the faculty and students of San Francisco State College, a federal judge, the Negro leadership, Eldridge Cleaver, the San Francisco Barristers Club, George Wallace and the Department of Mathematics at the University of California. The problems which Mr. Sevareid and CBS would confront in broadcasting replies to the many "personal attacks" in this program, as with the earlier program, would have been too formidable to permit the broadcast of the statements in the first instance.[34]

3. News Documentaries.

In intrinsic quality and the contribution they make to the level of public information, news documentary programs

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[33]Mr. Carmichael has appeared in several CBS newscasts and public affairs broadcasts before and after this broadcast, and was himself interviewed on *Face the Nation* on June 19, 1966. (A. II (E. 1) 54-57) Yet none of these appearances satisfies the requirements of the rules or paragraph 5.

[34]In the interest of general fairness CBS a week later broadcast on "60 Minutes" a panel discussion among four individuals of varying philosophies (none of whom had been "attacked" on the Hoffer program) to comment on Mr. Hoffer's views. While those making the comments were not responding to Mr. Hoffer's "personal attacks" but rather to his expression of views, the comments themselves included a number of additional personal attacks covered by the rules. For example, Grover Hall, the *Chicago Daily News* syndicated columnist, attacked not only Mr. Hoffer, but also Arthur Schlesinger, Jr. In addition, William F. Buckley, Jr. attacked Eldrige Cleaver, H. Rap Brown and Stokely Carmichael as a "Hitlerite phenomenon."

are among the most important broadcast by CBS.[35] CBS has made journalistic history with many of its documentaries, notable recent examples being "Hunger in America" and "Of Black America." All documentaries are subject to the full sweep of the rules, not even the paragraph 5 variant being available.

Each CBS documentary consists of a distillation of what its authors believe to be the most significant aspects of the subject under discussion. In accordance with their own standards and those of the CBS News Division, they make every effort to present the principal sides of the controversial issue being examined. In so doing, they necessarily must be free to select from among alternative methods and spokesmen to present each side. Substantial difficulty in scheduling, continuity and clearance would be posed if the editors were required to broadcast a personal reply to every statement falling within the rules' broad definition of a "personal attack." With these substantial prospective burdens before them, and with numerous other items of filmed and recorded material to select from in editing the final broadcast, the authors would be induced by the new rules to discard particular items of material which, no matter how fairly and objectively treated in the program itself, might create a duty to broadcast a personal reply by the individual or group attacked.

Apparently the Commission's primary reason for refusing to exempt documentaries is a "practical" one.[36] It be-

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[35]Among the awards received by *CBS Reports* in recent years are the George Foster Peabody Award for four consecutive years (1964-1967). The series or individual programs have also received awards from the Academy of Television Arts and Sciences (1966), the National Association for Better Radio and Television (1962 and 1964), the Thomas Alva Edison Foundation (1962 and 1964) and the American Bar Association (1963, 1964, 1965 and 1966).

[36]The Commission mistakenly suggests as an added reason that it is following the line drawn by Congress in Section 315 in declining to exempt news documentaries. However, Congress in 1959 exempted most documentaries (those in which the particular candidate was not the "predominant" subject of the program) from Section 315. See H. R. Rep. No. 1069, 86th Cong., 1st Sess. (1959), p. 4. Moreover, the Section 315 exemptions were adopted for an entirely different purpose. See below, p. 62.

lieves that while broadcasting replies to personal attacks might pose practical problems in newscasts and on-the-spot coverage of bona fide news events, no such practical considerations exist with respect to news documentaries. It states (A. 232a):

> "There is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained. . . ."[87]

The suggestion apparently is that in news documentary broadcasts, unlike newscasts and on-the-spot coverage of bona fide news events, it is feasible to include a reply in the original broadcast itself. In the realities of the preparation process, however, there is little practical difference between "newscasts" and "documentaries."

A few years ago documentaries might have been defined as retrospective, overall views of past events as opposed to the reporting of events as they happen. But in recent years the only generalization that satisfactorily distinguishes between a documentary and a newscast inheres in the greater depth, perspective and duration of the documentary. A particular event may indeed be both the subject of a five-minute segment in the *CBS Evening News* (which might be called a "mini-documentary") and the subject of a one-half-hour documentary later on the same or a subsequent evening.[88] There is no other practical difference between

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[87]The Government's brief for the first time suggests that "[a] program prepared very quickly to cover a fast-breaking development might very well be an exempt special newscast." (Govt. Br. 68 n. 35) Since even "exempt" newscasts are still caught by paragraph 5, the point is academic.

[88]As Professor William Wood has pointed out:

> "Brief documentary background pieces have been finding their way into the body of the expanded network and local station news programs. Running three, four, or five minutes,

"newscasts" and "news documentaries." Both are equally newsworthy. Both are produced under severe time pressures.[39]

Documentary programs dealing with controversial issues are frequently prepared in a short period of time. In 1968, for example, "CBS News Special Reports" were prepared in a matter of days—in some cases only hours—on such subjects as the careers and assassinations of Robert Kennedy and Martin Luther King, the Poor People's Rally, the Riot Commission Report and the Walker Report on the violence at the Democratic National Convention. Many such broadcasts contain statements which the Commission

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these consist of capsulized versions of in-depth treatments, which sounds like a contradiction in terms. But whatever they may lose in the condensation, their advocates point out they gain a considerably larger audience than they would as full-length programs of their own. If the story is worth it, it may be treated in three-to-five-minute segments over a period of days within the news program. This has the advantage of coming back to a topic again and again instead of treating it only once." ELECTRONIC JOURNALISM (1967), p. 52.

Mr. Wood is a professor at the Columbia University School of Journalism. Although he conducts a periodic review of the press over radio station WCBS in New York, he is not an employee of CBS, and his book reflects his own views.

At times it is almost impossible to distinguish between "newscasts" and "news documentaries." Often a single event will be the subject of a short special broadcast early in the evening, and will be treated in a longer format later in the evening. For example, the capsule fire death of the Apollo astronauts was the subject of seven separate CBS programs on January 27, 1967. News bulletins were broadcast at 8:16 p. m., 8:35 p. m., 8:46 p. m., and 9:05 p. m. An eight-minute special report was broadcast from 9:46 to 9:54 p. m.; a thirty-minute report was broadcast from 11:00 to 11:30 p. m.; and a nine-minute report was broadcast from 12:28 to 12:37 a. m. It is obviously difficult to draw any sensible distinction among these seven programs, even in terms of length.

[39]The time pressures involved are well illustrated by a discussion appearing in Professor William Wood's book ELECTRONIC JOURNALISM (1967). An accurate study of the preparation process, Professor Wood's description (quoted at length in Appendix A to this brief) merits detailed examination.

defines to be "personal attacks." For example, as we pointed out in the court below, "Killer on the Campus" (the program dealing with the Charles Whitman murders) on August 1, 1966, was prepared for broadcast that same evening. It contains statements that are unquestionably "personal attacks" on two alleged murderers, Howard Unruh and Richard Speck, on the "gun lobby" and on the National Rifle Association.[40] Under the rules the producers would have been required to give notice to each of these individuals and groups and solicit a reply. Within the time frame for producing the program, it would have been impossible to afford notice and include the reply in the same program. (See the discussion in Appendix A.) Since replies on some later program were also impracticable, the only feasible way of obeying the personal attack rules would have been to delete the offending statements.

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[40] Walter Cronkite stated that:

> "Seventeen years ago Howard Unruh, a man who read the Bible, a World War II veteran, shot and killed the first thirteen people he saw on several neighborhood streets in Camden, New Jersey. Unruh remains to this day in a New Jersey mental institution."

and that:

> "[I]n Chicago just three weeks ago a mass murder of eight young nurses shocked the nation. Richard Speck, a 24-year-old drifter, has been arraigned on all eight murder indictments."

Mr. Bakal, the author of THE RIGHT TO BEAR ARMS (1966), made the following statements:

> "The opposition comes from a lobby led by the National Rifle Association, which I should say is subsidized by the gun manufacturers and in part by the taxpayers, by the government, and this lobby feels there should be no restrictions whatever on the sale of guns, and as a result mental defectives like Whitman, criminals, anyone can buy a gun anywhere in this country with no questions asked.
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> * * *
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> "But they [the people and government officials] are overruled by this lobby which is highly organized and has won their point by distorting the facts of the bill, deceiving their members, and deceiving the members of the American public."

Similar time pressures exist even for documentaries that are prepared over a more extended period. No matter when the authors begin, the same time pressures that become apparent in the last few days of writing a brief also exist in the last few days before completing a documentary. As air time grows near, and the final few hundred feet of film are edited from the thousands of feet available, there is simply no time left to seek replies to whatever attacks may be contained in the footage finally selected. The practical impact of enforcing the rules would be to force the journalist to delete the statements that bring the rules into play, and to substitute less controversial footage.

The following examples of CBS news documentary broadcasts that were prepared over relatively long periods of time will illustrate the practical impossibility of including in a documentary the replies to every personal attack it contains.[41]

First, we refer the Court to the text of the *CBS Reports* program entitled "Ku Klux Klan: The Invisible Empire," broadcast over the CBS network at 10:00 p.m., EDT, on September 21, 1965, and contained in Volume II of the record. (A. II (E. 2) 1-28) This broadcast was in preparation for more than three months. The final version was "locked in" two days before broadcast; of the 46,700 feet of film shot or taken from libraries, only 2,500 feet survived to become the final product. The broadcast contains approximately 25 statements that are plainly or arguably personal attacks under the definition set forth in the Commission's latest rules. Virtually all of these attacks are directly related to the basic controversial issues and would be covered by the rules. While the broadcast displayed fundamental fairness through inclusion of interviews with

[41] Other examples of personal attacks appearing in CBS news documentary broadcasts are set forth in Volume II of the record. (A. II (E. 1) 89-130)

officials and members of the Klan as well as its victims and critics, no attempt was made to track down the subject of every personal attack. As we show below, it would have been impossible to do so.

1. At the beginning of the program, 13 alleged members of the Ku Klux Klan are charged with the murders of Mrs. Viola Liuzzo, Michael Schwerner, Andrew Goodman, James Chaney and Lemuel Penn (A. II (E. 2) 1). Of the 13, several subsequently are filmed on the program (while attending Klan rallies) (A. II (E. 2) 15). Neither those who appear nor the others are asked to comment on the charges, and none does so.

2. Klan officials are shown making bigoted personal attacks on Catholics, Jews and "niggers" (E.g., A. II (E. 2) 4-5). No representative of any of these identified groups appears to reply.

3. A Klansman says "We got a dictator in the White House a-dictating" (A. II (E. 2) 6). The President does not appear to reply.

4. A named Klan official is accused of turning funds over to George Lincoln Rockwell of the American Nazi Party. (A. II (E. 2) 8-9) Neither the official nor Rockwell (who was then living) appears to reply.

5. The narrator states that in the small community of Gray, Georgia, Klan intimidation stopped the only movie theater from permitting Negroes to sit in the balcony (A. II (E. 2) 18). No Klan representative appears to comment on this charge.[42]

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[42]Similar statements that the John Birch Society engaged in intimidation campaigns were recently held to be personal attacks within the meaning of the rules. See *University of Houston*, 11 F. C. C. 2d 790, 791 (1968).

6. The narrator states that the Bogalusa Klan intimidated local advertisers into cancelling commercials on a radio station owned by a white moderate (A. II (E. 2) 18). No representative of the Bogalusa Klan appears to reply.

7. A victim describes being castrated by a Klan group in Birmingham, Alabama. He concludes by stating: "I don't believe they're human." (A. II (E. 2) 19) No representative of the Klan appears to reply.

Even on the questionable assumption of a legal duty to "balance" an entirely truthful report on the Klan, CBS certainly took sufficient steps to provide Klan officials with an opportunity to explain their side to the viewing public. In the case of one direct accusation—that Reverend Connie Lynch was responsible for the violence in St. Augustine, Florida—Reverend Lynch himself appears on the broadcast and proudly accepts responsibility. (A. II (E. 2) 20-21) But it would obviously have been impracticable for CBS to have inserted into the program replies by every one of the persons and groups "attacked." Even if it had been practicable, the inclusion of their replies would have required the deletion of other material the producers regarded as having greater importance. To have sought and included the replies—or to have deleted either the offending material or the material displaced by the replies—would have seriously impaired the journalistic impact and integrity of the program.

Similar difficulties would have arisen if the rules had been applied to the *CBS Reports* program entitled "Biography of a Bookie Joint," carried on November 30, 1961, and also reprinted in Volume II of the record. (A. II (E. 2) 29-54) In this program CBS filmed the comings and goings of numerous persons into a bookmaking establishment in Boston, conducted in a store known as the Swartz Key Shop.

In the course of the program a number of shop employees and customers are shown. Policemen are filmed entering and leaving without making arrests. Numerous charges of illegal activity are made against named or photographed individuals.

It would have been impossible for CBS reporters to accost each individual who was being photographed and ask him if he would like to make a reply statement for inclusion in the program. As soon as the first man was approached, knowledge of the filming would have become general and the entire project would have come to an end. It would have been equally impossible to identify, locate and approach all individuals after the broadcast and to devote a second program or portion of a broadcast to any replies that might be made.

"Biography of a Bookie Joint" was a responsible and important piece of broadcast journalism. It directly resulted in a Treasury raid on the Swartz Key Shop and in a subsequent raid by the Boston police, the first on a gambling establishment in twenty years. It also led to a number of indictments and extensive state legislative inquiries. Its general fairness can be judged by anyone who reads the script.[43] But as a practical matter, application of the personal attack rules to a program such as "Biography of a Bookie Joint" would confront CBS with a dilemma that could only be resolved by scrapping the program.[44]

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[43]Indeed, the Commission specifically rejected a charge of unfairness leveled against the program by Speaker John F. Thompson of the Massachusetts House of Representatives. The Commission's ruling, issued five days after the landmark personal attack opinion in the *Billings Broadcasting Co.* case (23 Pike & Fischer, R. R. 951 (1962) see below p. 56), is silent on the numerous personal attacks contained in the program or any duty to grant time for reply. *Honorable John F. Thompson*, 23 Pike & Fischer, R. R. 955 (1962).

[44]It is interesting that in *United States* v. *Dubrow*, 201 F. Supp. 101, 103 (D. Mass. 1962), a case involving an indictment resulting di-

The Commission is therefore factually mistaken in its conclusions that "there is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time," and that "the matter is one where the person's response can be readily obtained . . . ." (A. 232a)

There is strong reason to doubt that journalists with the qualities of the men who prepare CBS documentary programs will be able to "choose" between the alternatives imposed by the rules. They will find that to continue broadcasting "personal attacks" is impracticable and that to "steer far wider of the unlawful zone" is unacceptable. Thus, under the new rules, news documentary programs as we now know them could not continue, and "only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera." *Pacifica Foundation,* 36 F. C. C. 147, 149 (1964).

4. Newscasts.

CBS news broadcasts, including newscasts and on-the-spot coverage of news events, would be particularly burdened by the personal attack requirement as set forth in the paragraph 5 variant. Each time a CBS journalist broadcasts a report of unlawful conduct, arrest, indictment, trial, conviction or sentencing, the journalist would be required to ascertain the views of the individual "attacked" and present his response. Each time the journalist reported an unfavorable comment by one public figure about another,

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rectly from the broadcast of this program, Judge Wyzanski had occasion to note:

> "The First Amendment's policy of a free press and a free reporting by television are always factors to be emphasized. And in this country the virtually unanimous view is that the executive not only lacks constitutional power to suppress a television documentary accurately reporting events, but also ought never be given this power if freedom is to be maintained."

the views of the person "attacked" would have to be ascertained and presented. This would be a particular problem in local news broadcasts which regularly contain a report of local law enforcement activities and arguments among local officials and other local public figures. Even the network television news, which deals only with events of national importance, contains numerous reports that constitute "personal attacks" within the definition of the rules.

For example, in the month following the Commission's latest memorandum opinion and order (April 1968), the *CBS Evening News* (network television news) reported that federal agents were investigating Stokely Carmichael's activities in connection with the Washington riots; that a named Marine Corps officer was being court-martialed for disobeying orders (and later that she was discharged from the Marine Corps); that a court had ordered Timothy Leary to begin serving his 30-year sentence for narcotics charges; that students at Columbia University had held three university officials prisoner for 24 hours and wrecked the office of President Grayson Kirk; and that Reverend William Sloane Coffin, Jr., Dr. Benjamin Spock and three other defendants were awaiting trial on charges of conspiring to help young men resist the draft. The network also reported many other attacks including an attack on Vice President (then Governor) Spiro Agnew,[45] a declaration by a caucus of Negro priests in Detroit that the Catholic Church in America is "primarily a white, racist institution," and a statement by a hospital director attacking organized medicine.[46] In covering a campaign by the Southern Christian Leadership Conference to recruit members

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[45]"Negro leaders who walked out of a session with Maryland Governor Spiro Agnew have accused him of 'tongue-lashing, condescension and paternalism.'" (April 12, 1968)

[46]"Across this land, the capacity that medicine has to provide good care is not equaled by the performance, for rich and poor. The leadership of organized medicine in the country in the last 20 years

for the 1968 Poor People's march on Washington, D. C., CBS News broadcast part of one recruiter's appeal that contained attacks on four individuals or groups.[47]

CBS journalists, of course, often do obtain and present as part of the same news item the response of a person attacked, but only if in their judgment this is feasible and newsworthy. Paragraph 5, however, leaves no room for the exercise of such discretion.

Long before the paragraph 5 variant was announced, the broad discretionary principles of the general fairness doctrine had effectively maintained the public interest in being fully informed about all sides of controversial news events. Thus, even though CBS did not broadcast responses to the specific "attacks" listed above, CBS has carried appearances by Stokely Carmichael, Timothy Leary, Columbia students, Dr. Coffin and Dr. Spock, Governor Agnew, officials of the Catholic Church, representatives of organized medicine, members of the Rockefeller family, George Wallace and President Johnson. These appearances were not made in response to the particular attacks mentioned; yet they informed the public as to the positions of these individuals and groups on major controversial public issues. These appearances fully satisfied the broad principles of the general fairness doctrine, but they do not satisfy the personal attack rules or paragraph 5.

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has spent most of their time and their efforts protecting the economic interests of the doctors rather than concerning themselves about the state of health of the nation—a very disgraceful chapter." (April 22, 1968)

[47]"A sick white man didn't kill Martin Luther King. The Rockefellers killed Martin Luther King. The George Wallaces killed Martin Luther King. The Lyndon Baines Johnsons killed Martin Luther King. This is what we were telling the Kennedys. This is what we were telling the Johnsons. This is what we were telling the Rockefellers. Now, you got all this money; you robbed our fathers, our mothers, our great grandfathers, our great grandmothers. Now we want you to take that money and divide it among the poor." (April 29, 1968)

It is hard to believe that the Commission meant to work so fundamental a change in the fairness doctrine by the almost parenthetical observations contained in paragraph 5. The language of this paragraph, however, leaves no room for any different interpretation.

5. Other News-Related Programs.

Several other types of CBS programs would be subject to the rules and would be similarly inhibited.[48] For example, inhibitory problems would arise in discussions and debates. The *At Random* discussion series, appearing on the CBS owned television station in Chicago (WBBM-TV), has carried such guests as Governor George Wallace, Mayor Richard Hatcher, Senator Charles Percy and Dr. Benjamin Spock. It has discussed such issues as civil disorders, the Vietnam War, church and state, racial prejudice and unionization. Other CBS stations frequently present debates on public issues. The *Lester Kinsolving Program* on KCBS Radio, San Francisco, last year presented debates or discussions on such subjects as capital punishment, fair housing, censorship, and the John Birch Society. Both panel discussions and debates frequently contain personal attacks upon persons other than those participating in the discussion

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[48]For example, panel discussions, debates and news conferences are clearly not within the news interview exception (the scope of which is defined by the comparable exemptions in the 1959 amendments to Section 315 of the Communications Act, 47 U. S. C. § 315). An exemption for panel discussions was eliminated from the 1959 bill by the Senate. 105 CONG. REC. 14453 (1959). In 1960 Congress thought it necessary to suspend the equal time requirements for the 1960 Presidential elections in order to encourage broadcast of debates, non-regularly scheduled news interviews and various types of discussion programs including appearances by candidates. See S. J. Res. 207, 86th Cong., 2d Sess. (1960); S. REP. No. 1539, 86th Cong., 2d Sess. (1960); 106 CONG. REC. 14472-77, 17035-41 (1960). The legistlative history with respect to news conferences is discussed in *Letter to CBS*, 3 Pike & Fischer, R. R. 2d 623 (1964), where the Commission held that news conferences did not come within the news interview exemption to Section 315.

or debate. The rules, by requiring notice and opportunity to reply, would substantially inhibit these broadcasts.

D. The Government Has Failed to Meet Respondents' Showing of Inhibition.

In the Government's view, respondents have failed to show "that the personal attack policy was burdensome to licensees (or stifled broadcast debate) during the years when it was in effect prior to the adoption of the rule; surely it can be assumed that most licensees have been conscientious enough to observe the policy even in the absence of the direct sanctions that the rule now imposes." (Footnote omitted) (Govt. Br. 70-71) The only reason the personal attack rules have not deterred CBS from broadcasting discussions containing personal attacks is that CBS has instructed its journalists not to follow the rules until their constitutionality has been finally adjudicated. See pp. 12-13, above.

Moreover, if the Government's view were correct, one might fairly ask what need exists for the new rules. According to the Commission, the new rules were specifically designed to change a situation in which the earlier case by case rulings were being disregarded, and to achieve compliance by bringing to bear a whole new range of sanctions.[49] As the Government admits, a recent survey, quoted

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[49] In its original Memorandum Opinion and Order of July 5, 1967, the Commission specifically stated that a major reason for adopting the rules was that "[d]espite . . . [the Commission's public notices] and the Commission's rulings, the [personal attack] procedures . . . have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations." (A. 213a-214a)

The Government itself admits in its brief that: "although all the components of the licensees' personal attack responsibilities had been spelled out previously in public statements, the Commission's experience indicated widespread uncertainty regarding, or simply disregard of, those duties." (Govt. Br. 65)

in footnote 39 on pages 71-72 of the Government's brief, shows that over 1500 broadcaster comments characterized the rules as either discouraging "broadcast of controversial issues," "[violating] the first amendment," "[leading] to government control of programming;" "[lacking] sufficient flexibility," being "too vague" or "burdensome."

The Government has almost totally ignored the numerous specific CBS examples of the problems posed by the rules as set forth above. Its response is buried in a footnote (Govt. Br. 71 n. 37) stating that "CBS has made no specific showing of any actual inhibition" and that the CBS examples are "simply inapposite under the rules as later amended in March 1968."

The first statement is wholly beside the point. First Amendment rights do not depend upon proof that a governmental restraint has actually suppressed speech that would otherwise have occurred; it is sufficient to demonstrate that the restraint, if enforced, would be likely to suppress.[50]

As for the reply that the CBS examples are "simply inapposite," it is unclear whether the Government means that some of the examples are taken from what are now so-called "exempt" programs or whether the statements which CBS cited as examples are not personal attacks. In either event the suggestion is incorrect. As discussed above, pp. 18-22, so-called "exempt" programs have been

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[50] "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. . . . [thus] the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). See *NAACP* v. *Button*, 371 U. S. 415, 432-33 (1963); *Smith* v. *California*, 361 U. S. 147, 150-51 (1959). See also, *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87 (1965).

effectively recaptured by the paragraph 5 variant which includes most of the burdens of the rules; in any event many examples are taken from documentaries and other programs that remain fully subject to the rules.

We respectfully invite the Court to examine Volume II of the record in detail. We submit that more than one-third of the examples cited are plainly personal attacks subject to the rules (including paragraph 5) and that the balance are sufficiently debatable to raise a substantial doubt in a journalist's mind.[51]

Such doubts would be amply justified by recent Commission rulings which define the following statements to be personal attacks:

1) "The irresponsible, immoderate acts of Martin Luther King, Jr. have done so much damage in Albany that it will take years for the wounds to heal." *Radio Albany, Inc.*, 4 Pike & Fischer, R.R. 2d 277 (1965).

2) A Congressman "and his friends are knowingly tampering with the truth." *Capitol Broadcasting Co.*, 8 F.C.C. 2d 975 (1967).

3) The Attorney General of Massachusetts received political contributions from friends "whether or not they're from the crime syndicate in Revere as . . .

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[51]For the first time in its brief to this Court, the Government suggests that "an 'attack' is something quite different from mere mention, comment, or even criticism." (Govt. Br. 72) But this does not comport with dictionary definitions of "attack" (*e.g.*, "to direct unfavorable criticism against," THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966 ed.) p. 95) or with the Commission's definitions set forth in the text.

[the Attorney General] says his are not . . . ." *Springfield Broadcasting Corp.*, 10 F. C. C. 2d 328 (1967).

4) "In Visalia, California the Birch Society mounted a campaign, under a front group of course, to remove a standard reference book from the library." *University of Houston*, 11 F. C. C. 2d 790 (1968).

5) When a Pike County, Kentucky couple was arrested on a charge of sedition, the arresting officers found their home to be "littered with books, newspapers, literature, [and] clothing."[52]

The Government may suggest, as it did below, that the examples cited in the CBS exhibits are not properly before the Court. If so, this suggestion is wholly unwarranted. The exhibits were ordered to be filed as part of the record by the court of appeals (A. 292a, 343a), and are printed in Volume II of the record appendix. They were taken from the transcripts of actual CBS broadcasts seen and heard by millions of people. The Government does not, indeed it could not, question their accuracy in any relevant respect.[53]

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[52] *Cumberland Publishing Co.*, 13 F. C. C. 2d 897 (1968). The Commission commented that since the arrested couple clearly denied the disorderly characterization of their home and claimed that the arresting officers themselves improperly littered it, the quoted statement was a "personal attack." In this case, the Commission also found some additional personal attacks relating to "a truckload of seditious material" and "Communist literature and films." However, the opinion may be fairly read as ruling that the statement about litter itself constituted a separate personal attack.

[53] As reports of statements that were in fact made, the transcripts are as legitimate an object of judicial notice as daily newspapers or other documentary material. *United States* v. *Louisiana*, 363 U. S. 1, 12-13 (1960); *Mamiye Bros.* v. *Barber S. S. Lines, Inc.*, 241 F. Supp. 99, 116 (S. D. N. Y. 1965), *affirmed*, 360 F. 2d 774 (2d Cir.), *certiorari denied*, 385 U. S. 835 (1966).

Moreover, the Commission's last action amending the rules was prompted in substantial part by the material in the first CBS exhibit (which had already been filed with the court of appeals), and the Commission's last memorandum opinion and order refers specifically to these materials.[54] The Commission has thus had ample opportunity to pass judgment upon these materials before they were considered by the court of appeals. In both the Seventh Circuit and in this Court the Government has studiously failed to indicate which of the excerpts in the record would, in its view, be neither plain nor arguable personal attacks.

In any event, where First Amendment rights are involved, the courts do not defer to agency expertise, but make independent judgments on such issues as the likelihood of inhibitory effect.[55] And in *New York Times Co.* v. *Sulli-*

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[54]"Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative." (A. 229a) Commissioner Loevinger, however, found the exhibit persuasive. "The CBS brief and accompanying exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation." (A. 240a)

[55]See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 488 (1962) (opinion of Mr. Justice Harlan):

> "We come then to what we consider the dispositive question on this phase of the case. Are these magazines offensive on their face? Whether this question be deemed one of fact or of mixed fact and law, . . . we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations. That issue, involving factual matters entangled in a constitutional claim, . . . is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves.";

Jacobellis v. *Ohio,* 378 U.S. 184, 188-89 (1964) (opinion of Mr. Justice Brennan):

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work

van, 376 U.S. 254 (1964), where the Court found that the possibility of suits against newspapers for nonmalicious libel of public figures would have a chilling effect on robust debate, the Court relied on its own experience and judgment rather than on any evidence as to chilling effect developed in the record.

The Government also suggests that in many instances of personal attacks covered by the rules, the "person attacked will decline to exercise the right of response." (Govt. Br. 69) The problem with this line of defense is twofold.

First, given the appetite of persons involved in public controversy for personal radio and television exposure, a high proportion of those invited to reply may be expected to accept. Second, even assuming *arguendo* that some unknown number of those invited to reply might decline, the journalist who prepares the broadcast containing any particular personal attack has no way of predicting in advance whether the particular subject may in fact accept the opportunity offered. At the moment of preparation when the deterrent operates, the journalist must take into account the substantial risk of inviting a reply.

The Government also argues that the many open questions as to the coverage and meaning of the rules do not have an inhibitory impact. (Govt. Br. 71-74) In its initial

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is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. . . .

"In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. . . . And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression."

See also *Watkins* v. *United States,* 354 U.S. 178, 198-99 (1957) (Court does not defer to Congress on whether investigation is unduly inhibiting).

memorandum opinion and order the Commission said that these open questions raise no problem because it stands ready to answer inquiries as to the meaning of the rules. (A. 215a n. 6)[56] However, the Government does not and could not suggest that such interpretations could be available in advance of broadcast.[57] When Eric Sevareid prepares a commentary during the day for delivery the same evening, he cannot stop to ask the Commission whether a particular phrase falls within the rules, and if he were to ask, he could not get an authoritative answer in time to be relevant. When a journalist is about to ask a question in a *Face the Nation* interview, he cannot ask the guest and

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[56]In promulgating the rules the Commission stated:

> "[W]e recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is 'identified' sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.*"

(Emphasis added.) July 5, 1967, Memorandum Opinion and Order, ¶ 9, A. 215a. Several examples of such uncertainties, taken from actual CBS broadcasts reproduced in Volume II, are set forth in the RTNDA brief, pp. 59-62.

After taking note of the uncertainties licensees face in determining their responsibilities under the rules, the Commission added, by way of footnote: "In appropriate cases, licensees can and should promptly consult the Commisssion for interpretation of our rules and policies." July 5, 1967, Memorandum Opinion and Order, ¶ 9, n. 6, A. 215a.

[57]Many Commission personal attack rulings are left unpublished, and these unpublished personal attack rulings are not generally available for public inspection. Rulings which are more than three years old are stored in the Archives at Suitland, Maryland, and must be specially ordered before they can be reviewed. Even those rulings less than three years old are not generally available. In the course of this proceeding, although counsel for CBS enjoyed the full cooperation of the Commission's staff in securing access to these rulings, it was necessary for an FCC employee laboriously to sort through the Commission's fairness files (personal attack files are not kept separately) in order to separate "confidential" Commission documents from public rulings.

the television audience to wait while he telephones someone in Washington. When the guest answers, the journalist cannot ask him to stop in mid-sentence until the legal effect of the answer is officially interpreted under the rules.

As the Seventh Circuit held, the Commission's announced willingness to interpret the rules—even if interpretation could be obtained before a broadcast—does not make the rules less objectionable. It makes them more so.[58] It casts the Commission in the role of a censor, possessed of discretion to determine in advance which statements, if made, will invoke the reply requirement. It enhances the likelihood of self-censorship and "play-it-safe" journalism. Whether or not the Commission would act arbitrarily in making these judgments,[59] this Court's decisions have long

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[58] "[A]llowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act.

"An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise. But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree." (Footnotes omitted.) A. 360a.

[59] In the past the Commission has not always applied the personal attack doctrine evenhandedly to all persons holding all shades of political opinion. For example, it has ruled that statements made by Governor George Wallace to the effect that Messrs. Braden and Dombrowski were Communists were not personal attacks within the Commission's personal attack doctrine. Letter to James A. Dombrowski, October 21, 1963 (FCC 8424); Letter to Carl Braden, January 21, 1964 (FCC 8424). See also the Commission's 1964 Fairness Primer: it "is not the Commission's intention to require licensees to make time available to Communists or the Communist view point." *Applicability of the Fairness Doctrine in the Handling*

condemned the delegation to administrative organs of vaguely defined discretion to control or burden the free exercise of First Amendment rights.[60]

Finally, the Government makes the remarkable suggestion that the Seventh Circuit erred in judging the rule "on its face."[61] It urges that "[t]he sensible course, and one consistent with the First Amendment, would be to allow the rule to operate for a time to see whether the fears and concerns of the broadcasters are justified." (Govt. Br. 78) Presumably, after this trial period, the Government would point with pride to the fact that broadcasters were still presenting news and public affairs programs and conclude from this that the rules are not inhibitory. But because it is not possible to demonstrate with precision what speech would have taken place had there been no inhibition, this Court has entertained challenges to statutes claimed to inhibit First Amendment

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of Controversial Issues of Public Importance, 29 Fed. Reg. 10416, 10417-18, 2 Pike & Fischer, R. R. 2d 1901, 1908. These rulings are apparently repudiated by the July 5, 1967, Memorandum Opinion and Order, ¶ 9,A.216a, but the Commission's views may change again.

[60]See *Shuttlesworth* v. *Birmingham,* 37 U. S. L. Week 4203 (Mar. 11, 1969); *Cox* v. *Louisiana,* 379 U. S. 536, 556-57 (1965). See also *Ashton* v. *Kentucky,* 384 U. S. 195, 199 (1966); *Gelling* v. *Texas,* 343 U. S. 960 (1952); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Saia* v. *New York,* 334 U. S. 558 (1948); *Schneider* v. *State,* 308 U. S. 147, 164 (1939). *Cf. Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963).

As the Department of Justice has observed in its brief in an unrelated proceeding:

> "[A] continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act. The Commission has not been given 'supervisory control of programs, business or policy' (*FCC* v. *Sanders Bros.,* 309 U. S. at 475)." Brief for appellant United States of America in No. 21147, D. C. Cir., *United States* v. *FCC* (*appeal dismissed,* Jan. 23, 1968.) p. 108.

rights not only as applied to particular circumstances but also "on their face." *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). See also *Shuttlesworth* v. *Birmingham,* 37 U.S.L. Week 4203 (Mar. 11, 1969); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964).

The Government argues that agency rules are somehow different because subject to reinterpretation in the light of changed circumstances. This possibility, of course, makes the rules no less inhibitory until the agency changes its mind or revises its rules. To await case by case enforcement and amendment of the personal attack rules would thus be to invite the very inhibition which makes the rules unconstitutional. *NAACP* v. *Button,* 371 U. S. 415 (1963); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963). See *Zwickler* v. *Koota,* 389 U. S. 241, 252 (1967). *Cf. Freedman* v. *Maryland,* 380 U. S. 51, 56 (1965). Moreover, Congress has deliberately authorized judicial review of agency rules without awaiting their application to a particular case. 47 U. S. C. § 402(a); *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407 (1942).

II. BECAUSE THE GENERAL FAIRNESS DOCTRINE AND THE PERSONAL ATTACK RULES DIFFER CRITICALLY IN THEIR ORIGIN, OPERATION AND INHIBITORY EFFECT, THE VALIDITY OF THE FAIRNESS DOCTRINE NEED NOT BE DECIDED IN THIS CASE.

The Government devotes a major part of its brief (pp. 41-58) to defending its regulatory power to adopt the general fairness doctrine. But this case does not, as the Government claims, call into question either the Commission's regulatory power over the conduct of broadcast

licensees[62] or the exercise of that power represented by the Commission's general fairness doctrine.

Contrary to the Government's implication, the general fairness doctrine and the personal attack requirement did not have a common origin. The general fairness doctrine has been Commission policy for over 40 years. *Great Lakes Broadcasting Co.*, 3 F. R. C. Annual Rep. 32, 33 (1929), *reversed on other grounds*, 59 App. D. C. 197, 37 F. 2d 993, *certiorari dismissed*, 281 U. S. 706 (1930). Its most authoritative statement appeared in the Commission's 1949 *Report on Editorializing by Broadcast Licensees*, 13 F. C. C. 1246.[63] In 1959 Congress also adverted to a general fairness requirement in connection with the amendments to Section 315 of the Communications Act, 47 U. S. C. § 315, exempting news and news-related programs from the statutory requirement of equal time for political candidates. 73 Stat. 557. At that time, Congress provided that the exemptions were not to be construed as relieving broadcasters "from the obligation imposed upon them . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[64]

The personal attack requirement is of much more recent origin. It postdates the 1959 amendments quoted above. The Commission itself has recognized that it was "during the last 7 years when the personal attack principle was being developed. . . ." *Storer Broadcasting Co.*, 11 F. C. C.

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[62]We do not dispute, for example, that the Commission has a limited power to consider, at the time of license application or renewal, the overall programming record or plans of a station as one measure of service to the community. *Henry* v. *FCC*, 112 U. S. App. D. C. 257, 302 F. 2d 191, *certiorari denied*, 371 U. S. 821 (1962); *Johnston Broadcasting Co.* v. *FCC*, 85 U. S. App. D. C. 40, 175 F. 2d 351 (1949); *Bay State Beacon, Inc.* v. *FCC*, 84 U. S. App. D. C. 216, 171 F. 2d 826 (1948). Even here the Commission is forbidden "to choose among applicants upon the basis of their political, economic or social views. . . ." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226 (1943).

[63]Hereinafter cited as *Report on Editorializing*.

[64]See the discussion of Section 315 below, pp. 62-63.

2d 678, 680, *affirmed*, 12 F. C. C. 2d 601 (1968). The genesis of the present personal attack rules lies in three 1962 rulings of the Commission in individual cases decided some three years after the 1959 amendments.[65] In the particular circumstances of each case, the Commission ruled that particular individuals or groups *repeatedly* "attacked" in one-sided programming were entitled to be furnished information as to the nature of the attacks and time for reply. In 1963 the Commission indicated for the first time that licensees generally were subject to the automatic duty to afford reply time in the "personal attack" situation. Public Notice of July 25, 1963, 25 Pike & Fischer, R. R. 1899.

Nothing like the personal attack requirement was discussed or referred to in the legislative history of the 1959 amendments to Section 315. The Government suggests that "Congress was informed on several occasions of the Commission's policies in the personal attack area" (Govt. Br. 25, n. 13), but points to no instance where this was done before 1963.[66] As the RTNDA brief (pp. 64-76) shows in

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[65] *Clayton W. Mapoles*, 23 Pike & Fischer, R. R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fisher, R. R. 951 (1962); *Times-Mirror Broadcasting Co.*, 24 Pike & Fischer, R. R. 404 (1962). (In the earlier *Report on Editorializing* (p. 1252) the Commission did include language to the effect that personal involvment in a controversy might be a factor to be considered along with other factors in determining whether to honor specific requests for discussion time on matters of public interest. But this language plainly recognized that station licensees had discretion to determine the circumstances in which a reply to an attack would be appropriate.)

Remarkably, not one of these three rulings is cited, much less discussed, in the Government's statement of the history of the fairness and personal attack doctrines. (The Government does include a quotation from its Public Notice of July 25, 1963 which, in passing, cites these cases. (Govt. Br. 23))

These landmark rulings are given only scant attention elsewhere in the petitioners' brief. The *Times-Mirror* ruling is mentioned in connection with the discussion of the political editorial rules (Govt. Br. 33) and all other rulings are cited without description in a long footnote at pages 63-64 together with 15 other rulings as a "further indication of the Commission's experience with personal attack problems. . . ."

[66] When the Government did inform Congress of its views, it relied on the *Mapoles*, *Billings* and *Times-Mirror* decisions as expressing the Commission's personal attack policy. See Hearings before the Senate Subcommittee on Communications of the Committee on Com-

detail, the legislative history of the 1959 amendments contradicts the notion that Congress knowingly approved or authorized the Commission to adopt a personal attack doctrine.[67]

The differences between the general fairness doctrine and the personal attack rules are not merely historical. They also differ in operation and effect. The general fairness doctrine requires that over a period of time the licensee present both sides of any important public issue it chooses to cover in its programs. On the other hand, the rules elevate every "personal attack" into an assumed public issue to which response time must be devoted. The fairness doctrine emphasizes public issues while the personal attack rules emphasize the vindication of personal interests and reputations.[68] They atomize the original issue being covered into

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merce on S. 251, S. 252, S. 1696 and H. J. Res. 247, 88th Cong., 1st Sess., pp. 97-98 (1963); Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess., pp. 88-89, 140-41, 156-66 (1963). Indeed, these decisions were incorporated into the House Hearings at the suggestion of Commissioner Ford. House Hearings, *supra*, pp. 156-66.

[67]There were no suggestions in the hearings, committee reports or debates that anything resembling the personal attack requirement was part of the Communications Act or of the Commission's fairness doctrine. In fact, the personal attack requirement is directly contrary to the spirit of the fairness requirements as conceived by Congress in enacting the 1959 amendments, which had their genesis with the Commission ruling in the *Lar Daly* case.

In the course of the debates on the "fairness" amendment to the bill, it was made clear that, as the fairness requirement was understood, it imposed only a general obligation on broadcasters to exercise their programming judgment in good faith, and was not a back door method of depriving broadcasters of discretion. 105 CONG. REC. 14457 (1959) (remarks of Senators Pastore, Proxmire and Hartke); 105 CONG. REC. 16231 (1959) (comments of Chairman Harris in response to Congressman Jones of Missouri); 105 CONG. REC. 16227 (1959) (comments of Congressman Celler).

Congress has several times since 1959 declined to adopt measures embodying the personal attack principle. H. R. 11851, 87th Cong., 2d Sess. (1962); H. R. 7612, 88th Cong., 1st Sess. (1963); H. R. 5415, 89th Cong., 1st Sess. (1965).

[68]Indeed, the rules do not even apply in two areas where full treatment of controversial issues is most important—discussion of political figures by their campaign opponents and discussion of the qualities of "foreign groups or foreign public figures." A. 226a.

many smaller issues, each of which sets off its own chain reaction requiring compliance with the rules.

Under the fairness doctrine, the licensee has considerable discretion in determining which issues are of public importance and the amount of the time which should be allocated to opposing views. Opposing views may be presented either through the station's own journalist or by some other spokesman chosen by the station. Opposing views need not be presented covering every minute detail of the views advanced on the other side; a general opposing view on the underlying public issue will suffice.[69] The licensee is left free to exercise the responsibility he was found to possess when he received his license or license renewal. Even if the Commission were later to determine after the fact that he failed to satisfy its standards of fairness in a particular case, it does not condemn and punish for that one transgression but judges the issue of subsequent license renewal on the overall manner in which he has discharged his stewardship.[70]

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[69] In *Honorable John F. Thompson*, 23 Pike & Fischer, R. R. 955 (1962) the Commission commented "[W]here the comments of a participant are subject to differing interpretations and emphases it cannot be expected that licensees will anticipate every possible interpretation and emphasis and provide counterbalancing program material." 23 Pike & Fischer, R. R. at 958. See also *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416 (1964) "[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming."

[70] See *Report on Editorializing*, p. 1255 ("The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's action with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.") Thus, not only is there no potential criminal penalty involved but, in any event, license renewal is not denied because of an isolated failure by the licensee to comply with the fairness doctrine. *Golden West Broadcasters*, 10 Pike & Fischer, R. R. 2d 523 (1967); *Capitol Broadcasting Co.*, 8 F.C.C. 2d 975 (1967); *Anti-Defamation League of B'nai B'rith*, 6 F.C.C.

The crucial difference between the general fairness doctrine and the new personal attack rules is that the former permits each station broad discretion to decide which of its broadcasts require balancing and to achieve balance in its own way.[71] The Commission does not attempt, and could not constitutionally attempt to substitute its judgment for the judgments of thousands of station licensees by deciding which broadcast statements require balance and how this is to be achieved. One of the doctrine's cardinal principles has been that no group or individual has a vested interest in being the spokesman to present a side of an issue.[72] Under the general fairness doctrine, the broadcaster is not told whom to put on, what format to use, how much time to allow or what degree of control over subject matter may be exercised by the licensee.

The discretion permitted under the general fairness doctrine but eliminated under the personal attack rules is of immense practical importance. Under the general fairness doctrine, when a critical comment concerning a person or group is broadcast on a CBS program discussing a controversial issue, CBS can decide whether in its judgment the comment has an important bearing on the underlying public issue and whether a reply would further public understanding of that issue. If so, it selects the appropriate spokesman, program format and time for the response.

Because it permits this discretion, the general fairness doctrine has not to date significantly deterred CBS from

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2d 385 (1967), *affirmed, Anti-Defamation League of B'nai B'rith* v. *FCC*, 403 F.2d 169 (D.C. Cir. 1968), *petition for certiorari docketed*, Jan. 29, 1969, No. 990, this Term, 37 U.S.L. Week 3285 (Feb. 4, 1969). See also Cahill, *"Fairness" and the FCC*, 21 FED. COMM. B. J. 17, 19-20 (1967). Of course, the Commission does issue declaratory rulings at times other than license renewal. *Letter to Oren Harris*, 3 Pike & Fischer, R. R. 2d 163 (1963).

[71] See *Cullman Broadcasting Co.*, 25 Pike & Fischer, R. R. 895, 896 (1963); *Report on Editorializing*, p. 1251.

[72] Cahill, *"Fairness" and the FCC*, *supra* at 23; *Lar Daly*, 19 Pike & Fischer, R.R. 1103 (1960), *affirmed, Daly* v. *United States*, 286 F.2d 146 (7th Cir.), *certiorari denied*, 368 U. S. 381 (1961); *Report on Editorializing*, p. 1251.

broadcasting discussions of important public issues or from permitting the inclusion in such broadcasts of statements falling within the Commission's definiton of a personal attack. The basic principles of general fairness sought to be enforced by the doctrine comport with CBS' own standards of journalistic responsibility and have not significantly inhibited its journalistic freedom.

Compliance with the particularized personal attack rules, on the other hand, would require CBS to make basic changes in the present content of its news-related programs. As we show in Part I of this brief, CBS journalists would be impelled either to delete the many "personal attacks" that are now contained in such programs, or to abandon the broadcasts altogether because such deletions would impair the programs' integrity.

For these reasons, as the Seventh Circuit specifically ruled, the general fairness doctrine presents significantly different constitutional considerations from the personal attack rules.[73] That court's decision invalidating the per-

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[73]The court stated (A. 357a-359a):

> ". . . there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner. Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the 'public interest, convenience, and necessity.' This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers could be determined on the basis of a single broad-

sonal attack rules implies nothing as to the fate of the general fairness doctrine. Indeed, the very existence of the general fairness doctrine, assuming *arguendo* its constitutionality, helps to demonstrate the unconstitutionality of the personal attack rules. According to the Government, the doctrine and the rules serve the same basic purpose—assurance that whenever any views on controversial public issues are broadcast, the public will hear both sides. (Govt. Br. 8-9) As the Supreme Court said long ago "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). Even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser* v. *Randall,* 357 U. S. 513, 520

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cast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties." (Footnotes omitted.)

At this point the court noted:

> "In its first memorandum opinion, the Commission said, 'the *only* new requirement in these rules are the time limits'. (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions." (A. 359a, n. 30)

Elsewhere it stated:

> "First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315. With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review." (Footnotes omitted.) (A. 365a)

(1958)) and "viewed in the light of less drastic means for achieving the same basic purpose."[74]

If there be an overriding public interest in requiring that every broadcast licensee balance its discussions of controversial public issues, the general fairness doctrine accomplishes that purpose with far less inhibitory effect than the personal attack rules. The personal attack rules being significantly more burdensome than necessary to achieve the desired end, they are therefore unconstitutional.

Similarly, this case is not affected by the constitutionality or unconstitutionality of Section 315 of the Communications Act. That provision, requiring equal time for political candidates, deals with the unique problems presented by the use of broadcast facilities for political campaigns. Arguably Congress may have power to place reasonable restrictions upon the direct involvement of federally licensed broadcast stations in political campaigns, including a requirement that opposing candidates be treated in an even-handed manner. *Cf. United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). Moreover, the candidates' rights to reply to one another are carefully limited by Section 315, and do not extend either to statements by non-candidates or, in general, to statements on documentary programs—two areas in which the personal attack doctrine applies.

For these reasons, the Seventh Circuit's decision deals with different issues than those involved in the constitutionality of Section 315. In deciding the constitutionality of the personal attack rules, this Court need not—and on the present record should not—consider the validity of

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[74] *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). See also, *e.g.*, *United States* v. *Robel*, 389 U. S. 258, 265-68 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 602-04 (1967); *Sherbert* v. *Verner*, 374 U. S. 398, 406-09 (1963); *NAACP* v. *Button*, 371 U. S. 415, 470 (1963).

either Section 315 or the Commission's general fairness doctrine.

III. THE COMMISSION'S RULES ON EDITORIALIZING IN POLITICAL CONTESTS ARE VIOLATIVE OF THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT.

The rules requiring reply time for political candidates who have been opposed in a station editorial, and for opponents of a candidate who have been endorsed in a station editorial, are subject to the same basic infirmities as the personal attack rules. In the same way as the personal attack rules, the election editorial rules deter free expression of licensee opinion, with the force of the deterrent increasing in proportion to the number of candidates in a particular election.[75] And just as do the personal attack rules, the election editorial rules interfere with the journalistic freedom of a broadcast licensee in a way that goes far beyond the fairness doctrine or any restraint on speech which might reasonably be thought to be in the public interest.

The Government makes no separate argument as to the statutory authorization for the political editorial rules; in fact it would be difficult for it to do so. Congress has manifested an intention that automatic reply requirements, such as those in Section 315, not be applied in the editorial area.

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[75]If the rules were limited to major candidates, CBS would have less difficulty with the rules. CBS stations as a matter of policy regularly permit major candidates full opportunity to answer CBS station editorials unfavorable to their candidacy. This does not mean that CBS stations mechanically limit reply time to candidates of the two major parties. In multi-candidate races CBS stations may make judgments that certain legally qualified candidates of minor parties are serious contenders, and warrant equal treatment. The CBS radio and television networks, as distinguished from the CBS owned stations, have not as a matter of practice presented editorials in political races.

Since 1927, when the Radio Act, 44 Stat. 1162, was adopted, Congress has seen fit to provide its own explicit rules for political campaign broadcasts. Over the years Congress has repeatedly rejected bills designed to broaden the very limited "equal time" rights which Section 315 gives to candidates when an opposing candidate has been afforded personal exposure on a broadcast station.[76]

The only modifications ever adopted to the Section 315 equal time rights were the 1959 amendments, which liberalized the section to except certain kinds of programs from the equal time requirements, and the 1960 joint resolution, which exempted the 1960 presidential and vice presidential races from the equal time requirement.[77] In 1934, and again in 1959, Congress specifically rejected a proposal which would have extended Section 315 to cover appearances by spokesmen for candidates in addition to covering appearances by candidates themselves.[78] Since Congress believed it inappropriate to extend the equal time requirement to spokesmen for candidates, there is no reason to suppose it would favor such a requirement where the broad-

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[76]See RTNDA brief, pp. 70-71.

[77]74 Stat. 554 (1960). It is of interest that in the recent Public Broadcasting Act, Congress once again reserved to itself regulation of election broadcasts. 81 Stat. 365 (1967). Because of concern about the independence of subsidized noncommercial stations, Congress forbade (Section 399) such stations to take editorial positions in election contests. Ordinary commercial broadcasters are not affected by this limitation, and the Commission was given no new powers over programming. Whether constitutional or not, this provision is one more illustration of the steadfast refusal by Congress to confer discretionary power on the Commission in this area.

[78]The 1934 proposal was carried over from H. R. 7716, 72nd Cong., 1st Sess. (1931), which passed both Houses of Congress but was pocket vetoed. In the 73rd Congress this proposal was introduced in the House, though not adopted. H. R. 1735, 73rd Cong., 1st Sess. (1933). The proposal actually passed the Senate but was eliminated in conference. *Compare* S. REP. No. 781, 72nd Cong., 2nd Sess. (1934), p. 8 *with* H. R. REP. No. 1918, 73rd Cong., 2nd Sess. (1934), p. 49. The 1959 proposal was introduced on the floor of the House and defeated there. See 105 CONG. REC. 16245-46 (1959).

caster is the spokesman, that is, where the broadcaster editorializes in favor of a candidate.[79]

Thus, Congress has deliberately decided to leave the broadcaster a broad sphere in which he is free to use his own judgment (subject to Congress' conception of the general requirement of fairness) in determining how to provide his public with balanced coverage of political campaigns. The fundamental thrust of this policy is to avoid the inhibitory effects of a mechanical "equal time" rule on broadcast coverage of political figures and public issues. It is inconceivable that Congress could have meant the Commission to have power to broaden the carefully limited "equal time" rights and impose a mechanical "right of reply" to political editorials, with equally inhibitory effects. It is particularly ironic that the Commission seeks to draw sustenance for its claimed power from the 1959 amendments to Section 315 which were designed to *narrow* the application of the equal opportunities requirements of the section to reduce the inhibitory effect of the section on broadcast expression.

The editorial rules also make it likely in many situations that the objective of fairness actually will be frustrated. A few illustrations make this clear.

Suppose in a multi-candidate race a station broadcasts an editorial stating that all candidates are well qualified but indicates a slight preference for candidate A. All opposing candidates (but not candidate A) are given rights of reply

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[79]To be sure, in the debates on the 1959 amendments, Congressman Harris expressed his personal opinion that compliance with the fairness requirement should compel a right of reply to political endorsements. 105 CONG. REC. 16231, 17781 (1959). He did not focus on the problem of minor candidates. And even if his statements could be read as supporting a right of reply for minor candidates, there is no basis for a suggestion that Congress, in enacting the 1959 amendments, intended to impose such a right of reply or to allow the Commission to do so. It was not until 1962 in the *Times-Mirror* case that the Commission gave the first hint of a political editorial requirement, and even then it was viewed as part of the emerging "personal attack" requirement.

by the rules through spokesmen who will certainly state overwhelming preferences for their respective principals. Thus candidate A may end up worse off because of the station's endorsement than without it. The station has in effect been treated as his spokesman although not designated by him as such.

Again, suppose a station opposes candidate B but expresses no views as to his opponents. Only candidate B is given a right of reply by the rule. If the opposition of that station to candidate B is pallid and the reply vigorous and effective, the double publicity exposure may be most helpful to candidate B and harmful to his opponents.

And again, suppose a station provides a balanced view in a two-candidate contest by broadcasting a station editorial for candidate A and also by broadcasting the remarks of an outside independent commentator who speaks in favor of candidate B. Complete fairness and complete compliance with the Commission's fairness doctrine may have been achieved and no violation of the equal opportunities rights under Section 315 would have occurred because neither candidate appeared personally. Yet, under the Commission's ill-considered rules, the station must now offer reply time to candidate B's spokesman, thus unbalancing the presentation.[80]

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[80]While CBS, on its own initiative, has followed a policy of refraining from election-eve or "last minute" editorials, and is therefore not now aggrieved by the 72-hour section of the political editorial rules, the constitutionality of this section seems difficult to reconcile with *Mills* v. *Alabama*, 384 U. S. 214 (1966). Apart from this basic infirmity, one can conceive of cases in which a statement (*e.g.*, a candidate making a racist remark) or disclosure (*e.g.*, documentary evidence of corruption) made on the eve of election might be so important as to justify the broadcasting of an editorial urging the public to vote against a particular candidate, even one the station may previously have endorsed. Although the last pre-election newspaper deadline may already have passed, the rules would appear to deter broadcast stations—the only journalistic medium still able to advise the public—from expressing their editorial views.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

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APPENDIX A

Selected Excerpts From Wood, Electronic Journalism (1967)

"The major news story which breaks suddenly or undergoes a new turn, or an important story continually in the news, prompt the topical special. This may be a single program—to look into the meaning behind a Harlem riot or the reasons back of an unexpected legislative action on a tax bill. Or it may be a regular weekly program to provide a continuing examination of a story like the war in Vietnam.

"Regardless of the form of the program, it is distinct from other in-depth treatments because it is prepared in a limited time. A television news team which is experienced and doesn't have to worry too much about budgets can put together a news special in short order. This may cost it the perspective that more time would permit, but it does give the audience additional dimension to the story while it is still fresh. Here is the chronology of the development of one—or rather two—network news specials.

"The big news on Sunday, July 31, 1966, was the rejection by the machinists union of a White House-endorsed settlement of a 24-day strike against five major U. S. airlines. About noon the next day, CBS News officials decided to produce a special hour on the strike story for broadcast Tuesday night at 10:00. At the moment this decision was being made, a demented student named Charles Whitman went on a shooting rampage on the campus of the University of Texas, the outcome of which was death for fifteen people including Whitman himself. This was to mean—although the CBS men did not know it then—that the news department would be involved in the production of two fast-deadline news specials at the same time.

Appendix A

"For the special on the airline strike, producer Les Midgley assembled his fifteen-man news team very early Monday afternoon, outlined plans for the hour-long show, and dispatched them to their appointed tasks. In New York the job began of selecting, screening, and editing news film and videotape of the 25-day television news coverage of the strike story. The CBS Washington Bureau got the job of lining up interviews with relevant spokesmen: William J. Curtin, principal negotiator for the airlines; P. L. Siemiller, President of the union; union members who voted for rejection of the settlement; Senator Wayne Morse, who had headed President Johnson's committee which earlier had recommended a solution to the dispute; and Secretary of Labor W. Willard Wirtz.

"New York writers began marshaling the information and factual material necessary to fill out the picture story for the program. The writing of the show began on Monday, was not finished until late Tuesday, the broadcast day. The writing, needed to tie in the new interviews and statements, was assigned to the Washington staff. Walter Cronkite was cleared for anchor man duties; a total of four Washington correspondents participated in the filming and taping of interviews.

"Just after 7:30 p.m. on Monday—while the strike special was beginning to take form—came the decision to do a crash, half-hour special on the Texas massacre. Cronkite's Evening News had just aired the story nationally, and everything pointed to an in-depth version as added elements turned up. The time of 11:30—less than four hours away—was selected as airtime, and CBS stations across the country were immediately alerted, since that hour is one during which stations normally do local programming.

"Midgley, his regular staff tied up with the strike special, had to round up additional manpower—writers, film editors, a director, and studio crew—for the new assignment. He reached Walter Cronkite, whose work seems never done, and put him on the anchor job. Carl Bakal, author of a new book on a pertinent subject—*The Right to Bear Arms*—was located and persuaded to appear on the program. In the meantime, the CBS crew in Austin, who had covered the Whitman story for the *Evening News,* was put back to work.

"CBS correspondent David Schoumacher and his camera team were asked to find new material to supplement what New York had received from them earlier, and 10:30 was set as the time for them to feed it so it could be taped in New York for incorporation into the air show. Technical difficulties ensued, and it was 11:25 before the last of the Austin part of the story reached headquarters. With a rough spot here and there, the sniper special got on the air and concluded with a thoughtful and thought-provoking interview of author Bakal, by Cronkite.

"Producer Midgley had little time to relax; for him it was back to the airline strike program, now less than 24 hours away. By the middle of Tuesday, the broad outline of the show had been generally determined. However, it was to undergo changes until the last moment. Facts were collected, writing was progressing, and interviews were taped or scheduled. The Washington Bureau had a new angle—a statement from an official of an electrician's union that if the machinists' settlement should exceed the President's non-inflationary guidelines, then all bets were off for adherence by other unions. Washington reported that they could not promise to deliver Willard Wirtz; it would be

late if at all. Midgley decided to insert the Washington portion of the hour by means of a switch and a direct, live feed during the broadcast instead of trying to preassemble all the ingredients in New York.

"Evaluation of the content of spokemen's statements already recorded prompted the production team to allocate the most airtime to Curtin and to Siemiller. Others were edited down to shorter time segments. Senator Wayne Morse and the electrician's spokesmen were scheduled, and a hole saved for the Labor Secretary, which was finally filled; his statement was taped in the Washington studio at 5:30 p. m.

"Only now, a few hours before deadline, was it possible to turn out a final line-up sheet, detailing all show segments in their order and the time allotted to each. Editing and final writing went on almost to airtime. Cronkite himself wrote the two-minute summation for the close of the show. At ten o'clock CBS viewers saw a three-and-a-half-minute introduction depicting the impact on the country of 26 days of interrupted commercial airline service and 'The Airline Strike: What Price Settlement?'

"How was it possible to bring off two such programs on such short notice? Newsman Midgley says the basic reason is that everyone on the team knew what to do."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 2 and 717

RED LION BROADCASTING CO., INC., *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

PAGE

Interest of *Amicus* 1

Statement of the Case 3

ARGUMENT:

The First Amendment does not command insulation of broadcasters from rules designed to effect fair access to public airwaves. The fairness doctrine and the rules thereunder are wholly within the ambit of the First Amendment and affirmatively foster the interests the Amendment was intended to serve 4

A. The Challenged Rules Are Subject to Reasonable Interpretation and Are at Least as Precise as Like Rules and Statutes Sustained by the Courts 5

B. New York Times v. Sullivan Strengthens and Emphasizes the Validity of the Challenged Rules 6

C. There Is No Basis or Authority for the RTNDA Holding That Similar Standards Are Applicable in Determining the Constitutional Propriety of Regulations Involving Broadcast as Compared With Press Media 7

CONCLUSION 10

Table of Authorities

PAGE

Cases:

Associated Press v. United States, 326 U. S. 1 (1945) .. 10

Dombrowski v. Pfister, 380 U. S. 479 (1965) 9

Farmer's Union v. WDAY, 360 U. S. 525 (1959) 5, 7

Grosjean v. American Press Co., 297 U. S. 233 (1936) .. 9

NAACP v. Button, 371 U. S. 415 (1963) 9

National Broadcasting Co. v. United States, 319 U. S. 190 (1943) 4, 5, 7, 8

New York Times v. Sullivan, 376 U. S. 254 (1964) 4, 6, 7

Speiser v. Randall, 357 U. S. 513 (1958) 9

United Church of Christ v. F. C. C., 359 F. 2d 994 7

Constitutional Provision, Statutes and Rules:

United States Constitution:

First Amendment .....*passim*

Communications Act:

§315 ..... 5, 6

47 U. S. C. §§312, 502, 503(b) 7

"Fairness Doctrine" of the Federal Communications Commission:

Personal Attack Rule 3, 4, 5, 8

Political Editorializing Rule 3, 4, 8

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RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a private, non-profit agency engaged solely in the defense and extension of the Bill of Rights. Among its other interests, it has

* Letters of consent to the filing of this brief from all parties have been filed with the Clerk of the Court.

been intimately concerned with the interaction of the First Amendment and broadcast communications policies. *Amicus* has an interest in the case at bar because it involves the question of the presentation of controversial issues of public importance.

This brief is principally submitted in support of the decision below in *Red Lion Broadcasting Company* and in opposition to the opinion below in *Radio Television News Directors Association.* The latter decision held, incorrectly we believe, that the First Amendment prohibits adoption of the Personal Attack and Political Editorializing Rules by the Federal Communications Commission.

Though we support the Personal Attack Rule itself, we do not support in every respect the procedural burdens which it places upon broadcasters. Thus, we believe that the purpose of the rules may be defeated if the broadcaster has the burden of searching out the attacked party in the first instance and sending him a transcript of the attack. We believe it adequate for broadcasters to be required to keep manuscripts of its broadcasts so that those who learn of an attack upon them, may have available the material to which they will reply after they have contacted the broadcaster.

Our brief is addressed primarily to the substance of the Personal Attack Rule and Political Editorializing Rule rather than to the enforcing procedures. However, we mention our reservations here so that the Court may be aware of them.

Statement of the Case

The cases before this Court involve challenges to two aspects of the "Fairness Doctrine" of the Federal Communications Commission. First and principally, the Personal Attack Rule; latterly, the Political Editorializing Rule.

In *Red Lion Broadcasting Company, Inc., et al.* v. *United States, et al.*, 381 F. 2d 908 [hereinafter referred to as *"Red Lion"*] the District of Columbia Circuit Court sustained the validity of an ad hoc order of the Federal Communications Commission which parallelled, in all relevant particulars, the later-promulgated Personal Attack Rule. In *Red Lion*, Station WGCB carried a broadcast by Rev. Billy James Hargis which included a personal attack upon Fred J. Cook, who had written a book concerning the 1964 Republican Presidential Campaign. Mr. Cook, learning about the attack on him and his book, wrote to Station WGCB requesting time to reply at the station's expense. The station responded by sending Mr. Cook a copy of a rate card with the suggestion that he notify the station concerning a time he might wish to purchase.

In *United States, et al.* v. *Radio and Television News Directors Association, et al.*, not as yet officially reported [hereinafter referred to as *"RTNDA"*] the Seventh Circuit Court of Appeals struck down as unconstitutional abridgments of the First Amendment, both the Personal Attack and Political Editorializing Rules.

ARGUMENT

The First Amendment does not command insulation of broadcasters from rules designed to effect fair access to public airwaves. The fairness doctrine and the rules thereunder are wholly within the ambit of the First Amendment and affirmatively foster the interests the Amendment was intended to serve.

The sweeping decision in *RTNDA* striking down the Personal Attack Rule was based upon three discrete premises. First, it was held that the Rules were too imprecisely and vaguely drafted, thereby providing inadequate guidance to licensees and necessarily inhibiting free speech. Secondly, the illegal burden on speech condemned by this Court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) was equated with allegedly "severe and immediate penalties" facing licensees as an "omnipresent threat" by reason of the Personal Attack and Political Editorializing Rules. Finally, the *RTNDA* Court found no longer valid the factual underpinning which formed the basis of this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), so that the standard it applied to the challenged rules was essentially the same as it would have applied to the rules purporting to govern access to newspapers and the press.

The *RTNDA* Court, it is respectfully submitted, was in fundamental error in each of its major conclusions.

A. *The Challenged Rules Are Subject to Reasonable Interpretation and Are at Least as Precise as Like Rules and Statutes Sustained by the Courts.*

As written, the Political Editorializing and Personal Attack Rules permit licensees to make fair determinations of when given broadcasts call for their application. Thus, for example, the petitioners in *Red Lion* have never seriously asserted that the broadcast statement for which the Personal Attack Rule was invoked was anything but a "personal attack • • • upon the honesty, character, integrity or like personal qualities of [Fred Cook]," the attacked party. Similarly, it should not be overly difficult in almost all instances for licensees to determine whether or not they have editorialized in favor of a political candidate during the course of a campaign. Of course, difficult questions of interpretation will arise, as is the case with all statutes, rules and regulations. The possibility or even probability of such a contingency, however, is hardly sufficient to invalidate the rules. In point of fact, the Personal Attack Rule is more sharply honed and self-explanatory than is the "public convenience, interest or necessity" standard under which the Federal Communications Commission is expressly authorized to operate under *National Broadcasting Co.* v. *United States, supra*, and which serves as the touchstone of Commission renewal decisions for all licensees. See *Farmer's Union* v. *WDAY*, 360 U. S. 525, 534 (1959). Moreover, in raising questions as to the meaning of certain aspects of the Personal Attack Rule, the *RTNDA* Court does nothing less than challenge §315 of the Communications Act. *Compare, Farmer's Union* v. *WDAY*, 360 U. S. 525 (1959). Thus, *RTNDA* focuses on the difficulty in distinguishing between editorials and news commentaries, a difficulty present in at

least equal proportion in determining the equal-time mandate of §315 itself. If a licensee is competent to distinguish between an editorial presentation and a "bona fide news documentary" sufficient to preserve the statute which sets forth such a distinction, it is at least equally capable of determing whether given statements are "attack[s] * * * made * * * during the presentation of views on a controversial issue of public importance * * * upon the honesty, character, integrity or like personal qualities of an identified person or group." As much as with any rules, those challenged here permit a licensee to make a reasoned judgment as to the statements meriting notice and offer of broadcast access and those which do not.

B. *New York Times v. Sullivan Strengthens and Emphasises the Validity of the Challenged Rules.*

The *RTNDA* Court found that an "omnipresent threat of * * * severe and immediate penalties" was imposed upon all licensees by the existence of the challenged rules. As such, it found the rules to be as burdensome as the threat of the substantial libel judgment which this Court set aside in *New York Times*. Such a finding, however, was made possible only by a failure to acknowledge that the "severe and immediate penalties" referred to in *RTNDA*, see footnote 29, *cannot be invoked* when licensees make a good faith determination that the challenged rules are inapplicable. Thus, the very line of demarcation set forth in *New York Times* as the touchstone of permissible libel sanctions—good faith error as opposed to malicious error, see 376 U. S. at 286, 287, 292—is the precise test employed in whether the "severe and immediate penalties" are to be invoked in the instant case. Only by indiscriminately lumping together as equiv-

alent "sanctions" the punishments set forth in 47 U. S. C. §§312, 502 and 503 (b) and the curative order, as in *Red Lion,* according broadcast access to a person "attacked" within the ambit of the rules, can those rules be said to pose any "omnipresent threat * * * of severe and immediate penalties." Yet, such a distinction articulates the very difference between threats of punishment condemned in *New York Times* and affirmative licensee obligations to provide broadcast time for various types of programs repeatedly upheld by this Court, e.g., *Farmers Union* v. *WDAY, supra* at p. 534.

Although the converse might well be argued, one can say that *New York Times* laid down tests for sanctions other than libel judgments. Similarly, one can agree as to its applicability to broadcast media. Under any circumstances, however, the *New York Times* insulation from sanction of only good faith error, precisely parallels the test applied in the case of the challenged rules.

C. *There Is No Basis or Authority for the RTNDA Holding That Similar Standards Are Applicable in Determining the Constitutional Propriety of Regulations Involving Broadcast as Compared With Press Media.*

RTNDA blithely reverses the holdings of this Court in *National Broadcasting Company* v. *United States, supra,* recently re-emphasized by the District of Columbia Circuit Court in *United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994. Citing a table showing that there are more radio and television stations presently operating than general circulation newspapers, see footnote 46, a law review article, and *no* cases involving regulation of broadcast media, *RTNDA* finds that conditions of scarcity no longer prevail for broadcast channels, and that the

distinction between broadcast and press media set forth in *National Broadcasting Company* is therefore, and for other reasons, "logically meaningless." With respect to the assertion of a present absence of scarcity of broadcast channels, the decision fails to discuss the implication of network control of broadcasting. It fails to set forth data regarding the scarcity of available broadcast frequencies in major urban centers. *RTNDA* is nothing less than an attempted reversal of this Court, of consistent decisions by other appellate courts, and of the very rationale of the Communications Act.

The difference between a triennial review of a licensee's adherence to principles of fairness and general access, and the Personal Attack Rule is only to be found in the greater immediacy of public recourse and the wider range of curative means available in the latter instance. Thus, the instant case necessarily challenges the Fairness Doctrine itself and, even more broadly, the general authority of the Federal Communications Commission to deny renewal applications to licensees who have permitted personal attacks to be aired over the full period of licensure. The petitioners do not contest the wrongfulness, nor even the danger, of repeated unanswered personal attacks such as took place in *Red Lion*, and such as were found by the Federal Communications Commission to take place on a widespread, national basis. They seek only to deny any public recourse to remedy the condition.

The Personal Attack and Political Editorializing Rules provide for no censorship of program content. They do not involve the control of programming, even to the slightest degree. Their applicability is limited to an extremely narrow range of circumstances, relating largely to broadcasts for which a licensee had full opportunity for con-

scious reflection on program content prior to having aired the challenged statement. The rules do not even require that equal time be provided for the curative responsive broadcasts, once again leaving to licensees the authority to make good faith determinations as to whether fair and equal access had previously been accorded, and if not, the time and nature of the responsive broadcast.

In an earlier era, "liberty of contract" was elevated to the level of constitutional principle. Such a determination was not wholly arbitrary, for the freedom of contracting parties from governmental interference had been a vital historic fact in allowing for development from a feudal, "status" society to a more libertarian, "contract" society. Yet, later growth of disproportion in bargaining strength between contracting parties made application of a "liberty of contract" theory the very means by which individuals with lesser bargaining strength could almost literally be returned to feudal status by straightforward application of the very contract law doctrines which had previously been liberating. Similarly, First Amendment freedoms, which in an era of free and easy access to communication media might arguably have been best served by total insulation from government regulation, are subverted in a circumstance of scarcity and monopoly of such media.

There is not present here a risk to free speech occasioned by a desire to inhibit disloyalty, *Speiser* v. *Randall*, 357 U.S. 513 (1958); or subversion, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); or barratry, *NAACP* v. *Button*, 371 U.S. 415 (1963). Risks to free speech are not here measured against community tax needs. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Here, any risks to free speech must be measured against the possibility that broadcasting will not foster "the widest possible dissemination of informa-

tion from diverse and antagonistic sources," which this Court has held to be the fundamental "assumption" on which the First Amendment rests. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

> "the widest possible dissemination of information from diverse and antagonistic sources." (*Id.* at 20.)

Viewed in this light, and in terms of the other considerations applicable herein, the First Amendment can hardly be said to foreclose so restrained and moderate, and yet so necessary a procedure as that encompassed by the challenged rules.

CONCLUSION

For the foregoing reasons this Court is respectfully requested to sustain the determination in *Red Lion Broadcasting Co., Inc.* v. *United States*, 381 F. 2d 908, and to reverse the determination in *United States, et al.* v. *Radio and Television News Directors Association, et al.*

Respectfully submitted,

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March, 1969

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 717.—OCTOBER TERM, 1968.

Red Lion Broadcasting Co., Inc., etc., et al., Petitioners, v. Federal Communications Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
United States et al., Petitioners, 717 v. Radio Television News Directors Association, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act[1]

[1] Communications Act of 1934, Tit. III, c. 652, 48 Stat. 1081, as amended, 47 U. S. C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that

that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

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office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newcast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), "shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for fabricating false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he

[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208-page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'"

concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia,[3] the FCC's position was upheld as constitutional and otherwise proper. 381 F. 2d 908 (1967).

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[3] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U. S. C. § 1004 (d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U. S. C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U. S. C. § 312 (a) (2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U. S. C. §§ 307 (a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and also to specify its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit on review of the rule-making proceeding as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons

associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315 (a) of the Act, 47 U. S. C. 315 (a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315 (a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4]

[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Act of 1912, c. 287, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Compare *Hoover* v. *Intercity Radio Co.*, 286 F. 1003 (C. A. D. C. Cir. 1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request con-

It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[6]

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all

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firmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

[6] Radio Act of 1927, c. 169, § 4, 44 Stat. 1162, 1163. See generally, Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 62 F. 2d 850 (C. A. D. C. Cir. 1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1941), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1959); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F. 2d 993, cert. denied, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36

(1929), aff'd 41 F. 2d 422 (C. A. D. C. Cir. 1930); *KFKB Broadcasting Assn.* v. *FRC*, 47 F. 2d 670 (C. A. D. C. Cir. 1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, in-

terest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ," 47 U. S. C. § 303 and § 303 (r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U. S. C. §§ 307 (a), 309 (a); renewing them, 47 U. S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U. S. C. § 309 (h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). It is broad enough to encompass these regulations.

[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., at 1616 (1930):

"Senator DILL. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner ROBINSON. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator DILL. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner ROBINSON. Oh, no.

"Senator DILL. It would be within the power of the commission, I think, to make regulations on that subject."

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has

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[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 541 (1962) (separate opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1873).

[9] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199 (1955); *Hastings & D. R. Co.* v. *Whitney*, 132

refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission

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U. S. 357, 366 (1889); *United States* v. *Burlington & M. River R. Co.*, 98 U. S. 334, 341 (1878); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871); *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956); *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17 (1953); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 87th Cong., 1st Sess., 4 (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1969); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket vetoed by the President in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950); *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.[12]

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public

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[12] "§ 326. Censorship.

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[13] John P. Crommelin, 19 P & F Radio Reg. 1392 (1960).

interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and Chairman of the Senate Committee considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine [14] and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959,

[14] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F. C. C., at 1251–1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes a personal attack or endorses a political candidate, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar

device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment

grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[15] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions

[15] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy, and the First Amendment, 10 J. of Law and Econ. 15 (1967); Ernst, The First Freedom 125–180 (1946); Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change (U. S. Government Printing Office 1968).

are reasonable and applied without discrimination. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States*, 319 U. S.

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Goverment to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to delete existing stations. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 361–362 (1955); Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326

U. S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time-sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of

Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, c. 169, § 18, 44 Stat. 1162, 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few net-

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confided solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, On Liberty 32 (R. McCallum ed. 1947).

works would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *U. S.*, 326 U. S. 1, 20 (1944).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[19] It would be better if the FCC's encouragement

[19] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." Stanton, Keynote Address, Sigma Delta Chi National

were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U. S. C. § 301. Unless renewed, they expire within three years. 47 U. S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest or necessity will be served thereby." 47 U. S. C. § 307 (a). In applying this

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Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in Wood, Electronic Journalism (1967).

standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *F. R. C.* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

D.

The litigants embellish their first amendment arguments with the contention that the regulations are so

vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious first amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment

when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded

[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U. S. Department of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Comm., Institute of Electrical and Electronics Engineers & Electronic Industries Assn., Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 272 F. 2d 533 (C. A. D. C. Cir. 1959), cert. denied, 361 U. S. 965 (1960).

portion of the frequency spectrum [22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, make it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity

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[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could saying nothing." *Lafayette Radio Electronic Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir. 1967), cert. denied, 389 U. S. 844 (1967).

[24] *Kessler* v. *FCC*, 326 F. 2d 673 (C. A. D. C. Cir. 1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to

impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible

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and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	40	45	40	44	0	1
Top 50.....	157	163	157	136	0	27
Top 100.....	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	7	17	7	16	0	1
Top 50.....	21	79	20	47	1	32
Top 100.....	35	138	34	69	1	69

1968 FCC Annual Report 132–135.

[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision

wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to

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regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history, the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment, and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances, without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 274 F 2d 753, 763 (C. A. D. C. Cir. 1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1009 (C. A. D. C. Cir. 1966).

render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

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[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizens Publishing Co. v. United States*, 393 U. S. — (1969).